Supreme Court, U.S.
FILED

No. 931040 DEC 28 1993

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In The

Supreme Court of the United States

October Term, 1993

EMPRESA NACIONAL SIDERURGICA, S.A.,

Petitioner,

v.

JERRY YOUNG,

Respondent.

Petition For A Writ Of Certiorari To The Louisiana Fourth Circuit Court Of Appeal

PETITION FOR WRIT OF CERTIORARI

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28 December, 1993

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159 pp

QUESTION PRESENTED

Post-trial juror affidavits show that active racism and prejudice against foreign corporations resulted in a biased verdict and impermissible punitive damages against petitioner. No hearing was held on petitioner's motion for new trial supported by affidavits of egregious racial bias.

The question presented is

WHETHER APPLICATION OF LOUISIANA CODE OF EVIDENCE ARTICLE 606(B) TO PROHIBIT JUDICIAL CONSIDERATION OF JUROR AFFIDAVITS SHOWING EGREGIOUS RACIAL BIAS AND PREJUDICE AGAINST PETITIONER DENIES DUE PROCESS OF LAW.

LIST OF PARTIES

The parties are petitioner, Empresa Nacional Siderurgica, S.A., and respondent, Jerry Young. Armadores de Cabotaje, S.A., was a separate appellant in the court below.

The following is a list of subsidiaries of petitioner, Empresa Nacional Siderurgica, S.A.:

Ensisteel, New York, Inc.

Pursuant to this Court's Rule 29.4(c), notice is hereby given that 28 U.S.C. § 2403(b) may be applicable, and that three copies of ENSIDESA's petition for writ of certiorari have been served upon the Honorable Richard P. Ieyoub, Attorney General of Louisiana.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Empresa Nacional Siderurgica, S.A., respectfully prays that a writ of certiorari issue to review the judgment of the Louisiana Fourth Circuit Court of Appeal entered in this matter on March 31, 1993.

OPINIONS, JUDGMENTS, AND ORDERS BELOW

The March 31, 1993 opinion of the Louisiana Fourth Circuit Court of Appeal is reported at 617 So.2d 517 and is reprinted herein, Appendix, 1a, *infra.* Rehearing was denied on May 12, 1993, App. 70a, *infra.* The Amended Final Judgment of August 24, 1989, and the Final Judgment of October 6, 1989, of the Civil District Court for the

Parish of Orleans (Honorable Bernette J. Johnson, Judge), appear herein, App. 64a, 67a, *infra*. The Order of the Louisiana Supreme Court denying certiorari, dated October 1, 1993, is reported at 625 So.2d 171, and reprinted herein, App. 69a.

JURISDICTION

The Judgment of the Louisiana Fourth Circuit Court of Appeal was entered March 31, 1993. Rehearing in the Fourth Circuit was denied on May 12, 1993. The Louisiana Supreme Court denied certiorari on October 1, 1993. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND CODAL PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment, Louisiana Code of Evidence Article 606(B), and Louisiana Code of Civil Procedure Articles 1762, 1763, 1768, on swearing and examination of jurors, which provisions are reproduced herein, App. 117a-118a, *infra*.

STATEMENT

Petitioner Empresa Nacional Siderurgica, S.A. ("ENSIDESA") is the National Steel Corporation of Spain. ENSIDESA manufactures and ships steel from the port in

Aviles, Spain, to, among others, the Port of New Orleans, Louisiana. Respondent Jerry Young, a stevedore, was injured while offloading a cargo of 60-foot steel "I-beams" shipped by ENSIDESA aboard the time-chartered M/V LORENA, a vessel owned by the Spanish corporation Armadores de Cabotaje, S.A., also a defendant below.

The case was tried before an Orleans Parish civil district court jury. On voir dire, prospective jurors were specifically informed that ENSIDESA was a foreign corporation, and that Young was a New Orleans resident. Upon oath to answer truthfully, they affirmed they would be impartial to ENSIDESA. App. 117a.

There was conflicting testimony concerning the safety of the stow and the cause of the accident. App. 1a, 6a. The beams were stacked in the "H" configuration, with edges resting on wood dunnage. The foreman of plaintiff's work gang on the day of the accident testified that he saw nothing dangerous about the stow. He had seen that type of stow many times before, and said it was a "perfect," "safe" stow. App. 7a. All steel beams were loaded in the "H" method at the Port of Aviles in 1982, the year of Young's injury. This was ENSIDESA's customary method of loading from 1956 to 1985, a period of 29 years. App. 8a. Albert Ross, a "marine surveyor," testified on behalf of plaintiff. Ross testified that he could not recall ever seeing a ship stowed with steel beams in the "H" manner. He inspected the condition of the cargo of steel beams on the M/V LORENA. Ross contradicted plaintiff's foreman, testifying that it was a "hazardous" stow, not a "correct" stow. App. 12a.

On cross examination, Ross, plaintiff's hired expert, said he had never been a stevedore or longshoreman. He could not recall whether he told the ship superintendent that he thought the stow was dangerous. He was aware that the foreman of plaintiff's gang thought the cargo was in perfect condition. He admitted that earlier in February 1982 he may have surveyed the same M/V LORENA loaded with beams stowed on the "H." He also admitted that he did not know whether the condition of the stow had anything to do with the accident. App. 13a.

(a). ***Jury deliberations.*** Following closing argument at 11:30 a.m. on April 26, 1989, the eleven jurors (one had been excused; nine were needed for a verdict) advised the court that they were ready to decide the case and did not need a lunch hour. Instead, they took a short coffee break, returned to the courtroom, and received their instructions. At approximately 12:45 p.m. they retired to the empty courtroom at the other end of the third floor of Civil District Court to deliberate. Juror Everett W. Granderson, Jr., was elected Foreman and the deliberations immediately began in a severe confrontational manner as Granderson launched an emotional, verbal attack on the other jurors. He literally began screaming, and throughout the afternoon and night, anyone located *anywhere* on the third floor of the Courthouse could hear the screaming. App. 97a.

> "Throughout the deliberations from beginning to end, statements were made by Mr. Granderson which were racist in nature and further demonstrated prejudice against corporations, foreign nationalities and gender;

> "Mr. Jessup and other jurors were confronted with accusations that they had no comprehension of what black men have had to go through, that they were unsympathetic to the black man's cause, and that blacks had paid a price for coming over on ships from Africa;
>
> * * *
>
> "Mr. Granderson made statements depicting corporations, including foreign corporations, as extremely powerful, that corporations unite together and run everything and that Mr. Young should prevail simply because he was a lone individual fighting corporations;
>
> "Mr. Granderson wanted to give the plaintiff an award in excess of $2,000,000.00 and stated that the jury should do so because the defendant corporations have many millions of dollars and that a verdict in excess of $2,000,000.00 would mean nothing to them. . . . "

Affidavit of Robert N. Jessup, Jr., App. 81a-82a.

Both plaintiff Young and Granderson (who, after an hour's screaming, was replaced as Foreman by an offended venire, App. 81a) are black.

Gay Barbarin, a black woman who served on the same jury, swore that throughout the deliberations

> "juror Everet W. Granderson, Jr., repeatedly made racist and prejudiced remarks involving matters irrelevant to the evidence presented in the case;
>
> "Mr. Granderson stated that Jerry Young's case was like the case of the slaves when they were brought to this country from Africa, and

> that the steel beams were stowed the way the slaves had been stored on ships;
>
> "Mr. Granderson said that the blacks and women on the jury should have been especially sympathetic to Jerry Young's plight because he is a black man;
>
> * * *
>
> "During the entire course of our deliberations, Mr. Granderson never once referred to any of the evidence which the parties had presented, but, to the contrary, he said that it was this jury's duty to compensate Jerry Young for reasons not presented in evidence."

Affidavit of Gay Barbarin, App. 89a-90a.

Juror Cynthia Gleason, a member of the required majority of nine, swore that Granderson, rather than discussing the evidence,

> "said that the case should be used as means of promoting social change and that the defendants, who were foreign corporations, had many millions of dollars and that to punish them beyond a slap on the hand, the jurors should give a multi-million dollar award to the plaintiff, who was a black man;
>
> "She felt very badly about the remarks which this racist juror repeatedly made and grew increasingly uncomfortable, almost to the point that she wanted nothing more to do with the deliberations and the trial;
>
> * * *
>
> "As it grew late in the night on April 26, 1989, she and other jurors simply wanted to end

> the ordeal and she thus consented to a verdict in an amount which was much greater than she otherwise believed was proper. . . . "

Affidavit of Cynthia S. Gleason, App. 92a, 93a.

The jury's verdict, in favor of Young, was in the amount of $1,700,000.00. App. 42a (617 So.2d at 521).

(b). ***ENSIDESA's Motion for New Trial.*** The jury's special verdict on damages included punitive elements outside the pleadings, and impermissible in this maritime action, as well as far in excess of plaintiff's own evidence – "perhaps the most compelling proof that the deliberations were not governed by a careful consideration of the evidence, but were instead the product of sympathy, prejudice and passion." Memorandum in Support of Alternative Motion of ENSIDESA for a New Trial, App. 73a. ENSIDESA specifically raised "federal rights of procedural due process," citing U.S. Const. amend. XIV, in seeking a new trial, supported by juror Jessup's affidavit. Supplemental Memorandum in Support of Motion for New Trial, App. 78a.

The post-trial affidavits of juror Gay Barbarin and of Cynthia Gleason were also submitted in support of ENSIDESA's motion for new trial. App. 78a. No contradictory affidavits or evidence of any kind was presented. The trial court, without holding a hearing and without assigning reasons, denied the motion.

(c). ***Fourth Circuit's holding.*** On appeal, the Louisiana Fourth Circuit rejected ENSIDESA's due process claim, holding that under Louisiana Code of Evidence Article 606(B) "the affidavits of these three jurors as to

matters or statements made by this particular juror during deliberations are clearly inadmissible to question the validity of the jury verdict." App. 35a (617 So.2d at 534). The court emphasized that Louisiana's version of 606(B) only permits juror testimony "on the question whether any *outside influence* was improperly brought to bear upon any juror," App. 35a (617 So.2d at 531-532). The court also rejected ENSIDESA's due process effort to show that Granderson lied on voir dire and violated his oath:

> "Prior to Louisiana's adoption of the Code of Evidence, a body of law allowed affidavits such as those offered by ENSIDESA for the limited purpose of showing that juror responded untruthfully on voir dire.
>
> "ENSIDESA argues that the affidavits are admissible to show that the juror in question violated his 'oath of impartiality.' However, the exception cited is not to be employed where the alleged untruthful statement was a general one that the juror could render an impartial verdict."
>
> "ENSIDESA's argument is directed only to an alleged general statement by the juror that he could be impartial. Thus the affidavits cannot be considered."

App. 35a-36a (617 So.2d at 534) (citations omitted).

The Fourth Circuit in its 44-page slip opinion said nothing about ENSIDESA's due process objection to Louisiana's absolute procedural bar to consideration of the jurors' affidavits as showing racial prejudice, and bias against foreign corporations, a claim that was repeatedly urged in ENSIDESA's original, App. 95a, 101a, and reply, App. 102a, 103a, brief.

(d). ***ENSIDESA's Application to Louisiana Supreme Court.***

ENSIDESA applied for writs to the Louisiana Supreme Court, assigning as error:

> "1. Despite LA-C.E. Art. 606's general prohibition of juror affidavits to impeach a verdict, the Court of Appeal erred by failing to consider affidavits regarding gross jury misconduct, and in sanctioning the trial court's denial of ENSIDESA's motion for new trial and its failure to hold a hearing to address the issues of misconduct, all in violation of ENSIDESA's constitutional right to due process."

App. 105a. ENSIDESA's Application, App. 106a, recites federal due process constraints: "a fair trial in a fair tribunal is a basic requirement of due process"; and claims that Granderson's "gross violations of the jury's duty of impartiality and of ENSIDESA's fundamental right to due process warrants a new trial, and at the very least, warranted a hearing in which to address the specific instances of partiality." App. 111a. The application, App. 115a, cites *Carson v. Polley*, 689 F.2d 562, 581-582 (5th Cir. 1982), a civil case in which the United States Court of Appeals for the Fifth Circuit recites that "[i]n an appropriate case, a letter from a juror to the court may reveal such a magnitude of prejudice as to move the court to grant a new trial rather than suffer an obvious default of justice"; and ENSIDESA's Application, App. 115a-116a, concludes:

> "Thus, it is clear that Rule 606 is not absolute, and ENSIDESA submits that given the constitutional violation of due process caused by the

> gross misconduct in this case, as well as the great prejudice suffered ENSIDESA is entitled to a new trial in which to fairly and impartially defend its rights. Anything less would undoubtedly be *'an obvious default of justice'*. (emphasis in original)

On October 1, 1993 the Louisiana Supreme Court unanimously denied writs. App. 69a (625 So.2d 171).

REASONS FOR GRANTING THE WRIT

1.

GRANDERSON'S RACIAL PREJUDICE AND BIAS AGAINST FOREIGN CORPORATIONS PLAINLY AND INVIDIOUSLY DENIED ENSIDESA DUE PROCESS OF LAW.

"Fairness of procedure is 'due process in the primary sense.' " *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 161 (1951) (Frankfurther, J., concurring). This Court should grant certiorari in this case to vouchsafe "that feeling of just treatment," *id.* at 162, enforced by the Due Process Clause of the Fourteenth Amendment. Surely, if jurors Jessup, Barbarin, and Gleason are believed – and no contradictory affidavits were filed below – Granderson's racial prejudice and hatred of foreign corporations deprived ENSIDESA of elementary due process: "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). As jury foreman, screaming for an hour, and as one whose racial anger and insistence upon punishing foreign corporations continued unabated late into the

night, Granderson's racial bias certainly "jar[s] one's constitutional sensibilities." *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2722 (1993), quoting *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991). "In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co. Litt. 155b. His verdict must be based on the evidence developed at trial." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Louisiana's absolute procedural bar to consideration of ENSIDESA's uncontradicted affidavits constitutes "a state practice of permitting juries to rely on a particular factor, such as the defendant's out-state status," which this Court in *TXO* stated "would violate due process." *TXO*, 113 S. Ct. at 2720; *id.* at n.23. Granderson's invidious equating of ENSIDESA's steel beams in dank cargo holds to slaves brought over from Africa, and his insistence upon punishing wealthy corporations for slave ships of the past, certainly "increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident." *Id.* at 2723.

Granderson's racial bias and his railing against wealthy corporations far exceed the appearance of bias that this Court condemned in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). "We must continuously bear in mind that 'to perform its high function in the best way "justice must satisfy the appearance of justice." ' " *Id.* at 864, quoting *In re Murchison*, 349 U.S. 133, 136 (1955) (citation omitted). And again: "The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact." *Liljeberg*, 486 U.S. at 869-870, quoting *Public*

Utilities Comm'n of D.C. v. Pollak, 343 U.S. 451, 466-467 (1952) (Frankfurther, J., in chambers). These due process admonitions were entirely ignored by the trial court, the Fourth Circuit, and the Louisiana Supreme Court below. As we show next, they cannot be.

2.

LOUISIANA'S ABSOLUTE PROCEDURAL BAR TO JUDICIAL CONSIDERATION OF GRANDERSON'S RACISM AND HIS GREEDY DESIRE TO BILK FOREIGN CORPORATIONS CONFLICTS WITH THIS COURT'S DUE PROCESS HOLDINGS IN *SMITH v. PHILLIPS* AND *McDONOUGH POWER EQUIPMENT INC. v. GREENWOOD*.

"This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith v. Phillips*, 455 U.S. 209, 215 (1982). Granderson's perverse racism, we submit, is patent on the face of the juror affidavits filed in support of ENSIDESA's motion for new trial and its request for a hearing. As early as Bracton, it was said that if the defendant "suspects any of the twelve jurors he may remove him for just cause . . . as where there . . . is a greedy desire to get his land. . . . " 2 S. Thorne, Bracton on the Laws and Customs of England 405 (1968). Due process mandates that ENSIDESA be given an opportunity to expose Granderson's perjury on voir dire,[1]

---

[1] *Accord, State by Lord v. Hayden Miller Co.*, 116 N.W.2d 535, 539 (Minn. 1962) ("The privilege which protects the deliberations of the jury from exposure does not extend to statements of jurors who may have on voir dire concealed prejudice or bias which would have disqualified them"); *Department of Pub. Works*

and his false swearing of Louisiana's oath of juror impartiality.[2] Contrary to the Fourth Circuit's characterization of the alleged untruthful statement as "a general one that the juror could render an impartial verdict," App. 36a, Granderson was specifically asked if he could be impartial towards ENSIDESA, and he lied in saying yes.

Granderson neither tried the case in an impartial manner nor according to the law and the evidence.[3]

& Bldgs. v. Christensen, 184 N.E.2d 884, 887 (Ill. 1962) (exception to rule of non-impeachment "when it is charged that a juror has answered falsely on voir dire about a matter of potential bias or prejudice"); *McNally v. Walkowski*, 462 P.2d 1016, 1019 (Nev. 1969) (same); *Weathers v. Kaiser Foundation Hospitals*, 485 P.2d 1132, 1140 (Cal. 1971) (same); *Fickes v. Pertolane-Alaska Gas Serv., Inc.*, 628 P.2d 908, 911 (Alaska 1981) ("Part of the right of an impartial jury is the right to know of juror biases favoring one party or the other"; exception for deceit on voir dire).

[2] "When the jury has been accepted by all parties, the jurors shall be sworne to try the case in a just and *impartial* manner, to the best of their judgment, and to render a verdict according to the *law and the evidence*." Louisiana Code of Civil Procedure Article 1768, App. 117a (emphasis added).

[3] *Cf. Clark v. United States*, 289 U.S. 1, 10, 11 (1933) (Cardozo, J.):

> "The petitioner stated to the court that her mind was free from bias. The evidence is persuasive that it was hostile to the Government. Bias is to be gathered from the disingenuous concealment which kept her in the box. . . . After the trial was over and deliberations had begun, she waved aside all argument and closed her ears to debate.
>
> * * *
>
> " * * * What was sought to be attained was the choice of an impartial arbiter. What happened was the intrusion of a partisan defender. If a kinsman of one

Louisiana's procedural response, declared by the Fourth Circuit below, is an absolute bar to judicial consideration of ENSIDESA's claim of racial bias. Louisiana's blindfold approach is fundamentally unfair and clashes with due process as this Court declared it in *Smith v. Phillips, viz.:*

> "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurences and to determine the effect of such occurences when they happen. Such determinations may properly be made at a hearing . . . . " 455 U.S., at 217.

See also *Rushen v. Spain,* 464 U.S. 114, 121 n.5 (1983) ("A juror may testify concerning any mental bias in matters unrelated to the specific issues that the juror was called upon to decide"). *Accord, Shipley v. Permanente Hospitals,* 274 P.2d 53, 56-57 (Ca. App. 1st Dist. 1954); *Weathers v. Kaiser Foundation Hospitals,* 485 P.2d 1132, 1140 (Cal. 1971); *Vezina v. Theriot Marine Serv., Inc.,* 554 F.2d 654, 656 (5th Cir. 1977); *Maldonado v. Missouri Pacific Ry. Co.,* 798 F.2d 764, 770 (5th Cir. 1986); *Hard v. Burlington Northern R.R.,* 812 F.2d 482, 485 (9th Cir. 1987); *Haley v. Blue Ridge Transfer Co., Inc.,* 802 F.2d 1532, 1535 (4th Cir. 1986).

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984), applies these same due process standards and the required hearing to civil litigation involving claims of juror bias: "One touchstone of a fair trial is an impartial trier of fact – 'a jury capable and willing to

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> of the litigants had gone into the jury room disguised as the complaisant juror, the effect would have been no different. The doom of mere sterility was on the trial from the beginning."

decide the case solely on the evidence before it.' " *Id.* at 554, quoting *Smith v. Phillips, supra,* at 217. "*Voir dire* examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors. . . . The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious." *McDonough,* 464 U.S. at 554.

Your Honors concluded (*id.* at 556):

> "We hold that to obtain a new trial in such situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire,* and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial."

We respectfully submit that the decision of the Louisiana Fourth Circuit Court of Appeal on ENSIDESA's due process request for a hearing on Granderson's disingenuous perjury "is in conflict with applicable decisions of this Court," SUP. CT. RULE 10.1(c), warranting certiorari.

3.

THE FOURTH CIRCUIT'S HOLDING THAT GRANDERSON'S RACIAL BIAS AND PREJUDICE AGAINST FOREIGN CORPORATIONS IS NOT "*outside influence*" PROVABLE BY JUROR AFFIDAVITS CONFLICTS WITH DUE PROCESS HOLDINGS OF STATE AND FEDERAL COURTS AND RAISES AN IMPORTANT CONSTITUTIONAL QUESTION WHICH SHOULD BE SETTLED BY THIS COURT.

In *After Hour Welding v. Laneil Management,* 324 N.W.2d 686 (Wis. 1982), Sidney Eisenberg was an officer

of defendant corporations and testified at trial. After an adverse jury verdict, defendants moved for a new trial claiming jury misconduct. The motion was supported by the affidavit of a dissenting juror swearing that during the course of the jury deliberations other jurors said that "Mr. Eisenberg is 'A Cheap Jew.' " 324 N.W.2d at 688. A unanimous Wisconsin Supreme Court held the uncontroverted affidavit competent to impeach the verdict for bias and ordered a hearing on the motion for new trial. Said the Court:

> "While the rule against impeachment of a jury verdict is strong and necessary, it is not written in stone nor is it a door incapable of being opened. It competes with the desire and duty of the judicial system to avoid injustice and to redress the grievances of private litigants.
>
> * * *
>
> "The concern for fairness to the parties and monitoring the integrity of the judicial system leads us to conclude that a trial court may, in appropriate circumstances, consider allegations that extraneous prejudicial remarks were made to jurors which were not part of the judicially guarded evidence they received. . . .
>
> * * *
>
> "Whenever it comes to a trial court's attention that a jury verdict may have been the result of any form of prejudice based on race, religion, gender or national origin, judges should be especially sensitive to such allegations and conduct an investigation to 'ferret out the truth.' *Morgan v. United States*, 399 F.2d 93, 97 (5th Cir. 1968), *cert. denied* 393 U.S. 1025 (1969). For even if only one member of a jury harbors a material prejudice, the right to trial by an impartial jury is impaired. *United States v. Booker*, 480 F.2d 1310

> (7th Cir. 1973). . . . The form of stereotyping as evidenced by the juror Stokes' affidavit has no place in our system of justice. Trial courts should do all within their means to ensure that verdicts have not been compromised by jurors who harbor prejudice towards any minority."

Id. at 689, 690 (parallel citations omitted). The Court emphasized that Eisenberg's case was an especially appropriate one because "the evidence to be considered by the jury raised purely an issue of credibility." *Id.* at 690. Compare the Fourth Circuit's declaration here: "the jury was faced with a credibility call." App. 18a (617 So.2d at 527). The Wisconsin Supreme Court concluded:

> "The contents of the affidavit stand as a verity at this time and, if believed, as a matter of law, would have had the probable prejudicial effect upon a hypothetical jury when considering a question of credibility.
>
> "This case is being sent back to the trial court again with instructions to conduct a hearing taking testimony as the judge believes necessary from persons who may have knowledge of the alleged incidents. Due to the thus far uncontroverted affidavit of the dissenting juror, the trial court should examine the juror under oath only as to the circumstances under which the statements were made and not as to what effect they had, if made, on himself as a juror or on the other jurors. The judge must then determine whether he is convinced by clear and satisfactory evidence the statements were made and determine as a matter of law the probable effect of them upon a hypothetical average jury."

Id. at 691.

The decision of the Wisconsin Supreme Court tracks this Court's due process analysis of juror bias and the required hearing in *Smith v. Phillips* and *McDonough;* it stands in stark contrast to the absolute procedural bar enforced by the Louisiana Fourth Circuit Court of Appeal, which we say denies due process.

The Fourth Circuit's constricted holding that Granderson's racial bias is not *"outside influence"* within Louisiana's only exception to Article 606(B)'s prohibition of impeachment of civil verdicts by juror affidavit[4] conflicts with the construction of Federal Rule of Evidence 606(b), the source of Louisiana's article, in *Tobias v. Smith,* 468 F.Supp. 1287 (W.D.N.Y. 1979). See also *Wright v. United States,* 559 F.Supp. 1139, 1151 (E.D.N.Y. 1983) (noting that there are "potential constitutional difficulties in applying Rule 606(b) to all allegations of racial prejudice" and concluding that "the better rule . . . is to analyze each such claim on a case-by-case basis"), *aff'd,* 732 F.2d 1048 (2d Cir. 1984), *cert. denied,* 469 U.S. 1106 (1985).

Academic commentary also conflicts with the reasoning of the Fourth Circuit:

---

[4] Unlike Federal Rule 606(b), Louisiana Code of Evidence Article 606(B) contains no exception in civil cases allowing a juror to testify "on the question whether extraneous prejudicial information was improperly brought to the jury's attention." See App. 118a, *infra.* The Official Comments to Louisiana Article 606 recite in part: "Paragraph B of this Article follows the Federal Rule of Evidence 606(b) with respect to criminal cases. It provides a modified version of Federal Rule of Evidence 606(b) for civil cases. Its adoption clarifies and to an extent modifies prior Louisiana law." West's LSA-C.E., 1993 Special Pamphlet, Evidence Code, Art. 606, Comment (b), p. 240.

> "Bias might not qualify as an 'outside influence' since it is imposed as a factor in decisionmaking by the jury itself, not some source extrinsic to the jury. On the other hand, bias may be considered an outside influence if what is meant by that term is an influence on the verdict 'outside' of the record and the parameters of constitutionally acceptable values that the jury may use in its deliberations. . . .
>
> "If bias is not covered by the exceptions in Rule 606(b), that rule may be unconstitutional insofar as it makes jurors incompetent to testify that a verdict was based on bias. The United States Supreme Court has long recognized that 'there might be instances in which [the] testimony of the juror could not be excluded without "violating the plainest principles of justice." ' "

27 Wright and Gold, Federal Practice and Procedure § 6074, pp. 434, 435 (1990), quoting *McDonald v. Pless*, 238 U.S. 264, 269 (1915). *Accord*, Peter N. Thompson, Challenge to the Decisionmaking Process – Federal Rule of Evidence 606(b) and the Constitutional Right to a Fair Trial, 38 S.W.L.J. 1187, 1221 (1985) ("Those procedural rules that preclude counsel from investigating and developing evidence from the jurors about the potential constitutional violations are substantially suspect if not patently unconstitutional.").

Every court, both federal and state, that has considered the question of whether racial or other invidious prejudice constitutes "outside influence" under Federal Rule of Evidence 606(b) or parallel state rules has left due process room for proof of egregious racial bias tainting the defendant's due process right to an impartial jury: "In

an appropriate case, a letter from a juror to the court may reveal such a magnitude of prejudice as to move the court to grant a new trial rather than suffer an obvious default of justice." *Carson v. Polley*, 689 F.2d 562, 581-582 (5th Cir. 1982). *Accord, Smith v. Brewer*, 444 F.Supp. 482, 490 (S.D.Iowa 1978) ("the Court does not suggest that the rule of juror incompetency embodied in Rule 606(b) should be applied dogmatically and in complete disregard of what is alleged to have occurred in the jury room"; and citing *McDonald v. Pless, supra*, to the effect that where an offer of proof shows a substantial likelihood of prejudice "by the influence of racial bias in the jury room, to ignore the evidence might very well offend fundamental fairness"), *aff'd*, 577 F.2d 466 (8th Cir.), *cert. denied*, 439 U.S. 967 (1978). See also *Sanchez v. Int'l Park Cond. Ass'n*, 563 So.2d 197 (Fla. 3d D.C.A. 1990); *Singletary v. Lewis*, 584 So.2d 634 (Fla. 1st D.C.A. 1991).

A sharply divided Wisconsin Supreme Court, although abandoning its earlier holding in *After Hour Welding* that racial prejudice is an "outside influence" as to which a juror may testify, nevertheless reaffirmed the right to a due process hearing on juror allegations of racial bias and judicial review of the record made before the trial court in search of substantial likelihood of prejudice:

> "A hearing was held in which the trial court questioned the affiant juror about the contents of the affidavit. The juror testified that the comment was made in the presence of all the other jurors approximately fifteen to twenty minutes before the jury came back. . . .
>
> "After taking the testimony of the juror and listening to the arguments of counsel, the trial court denied the motion for a new trial stating:

'[A]lthough [the statement] could be categorized as a racial slur, the court does not find by clear, satisfying evidence convincing proof that this information would be prejudicial to a hypothetical jury . . . ' "

* * *

"Important as the policies underlying jury secrecy are, there are situations where these interests must give way to the competing interest in ensuring a fair trial and a just resolution of the issues in the individual case.

* * *

"We agree with the reasoning and the holdings of the *McDonald, Smith, Carson* and *Wright* cases *supra.* We conclude that the record here does not 'reveal such a magnitude of prejudice' as to constitute 'an obvious default of justice,' or show such a 'substantial likelihood' that the defendant was prejudiced by the influence of racial bias in the jury room as to 'offend fundamental fairness' or 'violat[e] the plainest principles of justice.' The trial court after a hearing and the Court of Appeals both found that no such violation occurred here. We agree."

State v. Shillcutt, 350 N.W.2d 686, 688, 689, 695 (Wis. 1984) (per Day, J.) (Steinmetz, Bablitch & Abrahamson, JJ., "are persuaded that consideration by the jury of racial stereotypes amounts to 'outside influence' as to which the juror may testify," *id.* at 705, Abrahamson, J., dissenting).[5]

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[5] "Research has revealed no other case applying Rule 606(b) or a comparable state rule where the opinions of the justices were so sharply divided and where the arguments

In effect, then, courts, to preserve due process, make admissibility of juror testimony of racial or other invidious prejudice contingent on a showing that such evidence, if believed, is sufficient to establish a denial of the right to an impartial jury. This was Judge Learned Hand's view:

> "judges again and again repeat the consecrated rubric which has so confused the subject; it offers an easy escape from embarrassing choices. In the case at bar at any rate we shall accept what the affidavits said, as did the judge, and like him we shall decide whether it requires the relief asked."

Jorgensen v. York Ice Machine Corp., 160 F.2d 432, 435 (2d Cir. 1947). *Accord, Klimes v. United States*, 263 F.2d 273, 274 (D.C. Cir. 1959); *People v. Hutchison*, 455 P.2d 132, 137 (Cal. 1969) (in bank) (per Traynor, C.J.) (impeachment permissible as to improper influences "open to sight, *hearing*, and the other senses and thus subject to corroboration") (emphasis added).

The door-slamming approach of the Louisiana Court of Appeal is too insensitive to due process:

> "The rule of juror incompetency cannot be applied in such an unfair manner as to deny due process. Thus, further review may be necessary in the occasional case in order to discover the extremely rare abuse that could exist even after

---

focused so explicitly on the conflict between the policies underlying the no impeachment rule and the policies of protecting the litigant's right to a fair trail." Note, Racial Slurs by Jurors as Grounds for Impeaching a Jury's Verdict: *State v. Shillcutt*, 1985 Wis. L. Rev. 1481, 1522 n.271.

> the court has applied the rule and determined the evidence incompetent."

Shillcutt v. Gagnon, 827 F.2d 1155, 1159 (7th Cir. 1987).

Commentators also object to blanket rules either excluding all juror testimony of bias or admitting all such testimony.

> "A balance must be struck, protecting parties from the most egregious cases of jury bias while leaving the jury free to decide most cases without fear of judicial intrusion. While lines may be difficult to draw in many cases, it should be clear that among the most serious cases of jury bias are those involving racial prejudice. Eradication of the evil of state supported racial prejudice is at the heart of the Fourteenth Amendment. This suggests that the constitutional interests of the affected party are at their strongest when the jury allegedly employs such bias."

27 Wright and Gold, Federal Practice and Procedure § 6074, p. 438 (1990) (footnote omitted). *Accord*, Christopher B. Mueller, Jurors' Impeachment of Verdicts and Indictments in Federal Court Under Rule 606(b), 57 Neb. L. Rev. 920, 942 (1978) ("Serious and sensitive problems may arise if it can be made to appear that a verdict was the product of egregious racial or ethnic prejudice"); Comment, Impeachment of Verdicts by Jurors – Rule of Evidence 606(b), 4 Wm. Mitchell L. Rev. 417, 443 (1978) ("The public policies behind the exclusion must be balanced against the probable injury to litigants and the goal of the system to achieve justice"); Susan Crump, Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule

606(b) Justified?, 66 N.C.L.R. 509, 512 (1988) ("There are, however, substantial countervailing policies. These policies favor inquiry into truth, the appearance of fairness to litigants, and public respect for the courts"). See also *United States v. Reid*, 12 How. 361, 366 (1851) (Taney, C.J.) ("It would, perhaps, hardly be safe to lay down any general rule upon this subject. Unquestionably such evidence ought always to be received with great caution. But cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice.").

Tanner v. United States, 483 U.S. 128 (1987), is not to the contrary. A hearing was held in *Tanner;* this Court considered the affidavits submitted in support of new trial, including Juror Hardy's affidavit; Your Honors held, quite narrowly: ' These allegations would not suffice to bring this case under the common-law exception allowing post-verdict inquiry when an extremely strong showing of incompetency [or we say of racial bias] has been made." *Id.* at 126. And further: "At issue in this case is whether the Constitution compelled the District Court to hold an *additional* evidentiary hearing including one particular kind of evidence inadmissible under the Federal Rules." *Id.* at 126-127 (our emphasis).

ENSIDESA's case is different: no hearing at all was held; the uncontroverted affidavits swear to insidious racial bias. A different due process balance[6] is

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[6] Mr. Justice Cardozo's words are better than any we could write on the need for crucial distinctions in the law:

> "The social policy that will prevail in many situations may run foul in others of a different social policy,

required in ENSIDESA's case. "Nonetheless, at least in cases involving racist juror misconduct, *Tanner* should not be read to invalidate the practice of admitting juror testimony when it establishes a constitutional violation." Developments, Part VII, Racist Juror Misconduct During Deliberations, 101 Harv. L. Rev. 1595, 1598 (1988). *Accord, Shillcutt v. Gagnon*, 827 F.2d 1155, 1158-1159 (7th Cir. 1987) (citing *Tanner*, but questioning "whether prejudice pervaded the jury room, [and] whether there is a substantial probability that the alleged racial slur made a difference in the outcome of the trial").

This Court has set its hand firmly against "racial discrimination in the administration of justice." *Cassell v. Texas*, 339 U.S. 282, 290 (1950), quoted in *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 1373 (1991). Speaking of disqualifying juror racial bias in criminal trials, Mr. Chief Justice Hughes said as early as 1931, "if any one of them was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit." *Aldridge v. United States*, 283 U.S. 308, 314 (1931). *Accord, United States v. Booker*, 480 F.2d 1310, 1311 (7th Cir. 1973) (Stevens, J.). Chief Justice Hughes rejected the Government's argument

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> competing for supremacy. It is then the function of a court to mediate between them, assigning, so far as possible, a proper value to each, and summoning to its aid all the distinctions and analogies that are the tools of the judicial process. The function is the more essential where a privilege has its origin in inveterate but vague tradition and where no attempt has been made either in a treatise or in decisions to chart its limits with precision."

Clark v. United States, 289 U.S. 1, 13 (1933).

> "that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred."

Id. at 314-315. *Compare* Affidavit of Cynthia Gleason, App. 92a, *infra*.

Recently, this Court insisted upon a color-blind civil jury as well:

> "A civil proceeding often implicates significant rights and interests. Civil juries, no less than their criminal counterparts, must follow the law and act as impartial factfinders. And, as we have observed, their verdicts, no less than those of their criminal counterparts, become binding judgments of the court. Racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal."

Edmonson v. Leesville Concrete Co., Inc., 498 U.S. 936, 111 S. Ct. 2077, 2088 (1991) (per Kennedy, J.). Whether the standards of Chief Justice Hughes and of *Edmondson* extend into the jury room is an important question of due process presented by ENSIDESA's petition.

The affidavits proffered below show patent racism in the administration of civil justice in New Orleans[7] and a

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[7] *Cf. City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 505, 510 (1989) (Opinion of O'Connor, J.), rejecting the City of

greedy desire to punish foreign corporations and invade their pocketbooks for racial, not evidentiary, reasons. Granderson's bias is more perverse than Juror No. 1's in *King Size Publications, Inc. v. American News Co.*, 194 F. Supp. 109, 110 (D.N.J. 1961): "I will never render a decision in favor of a Plaintiff in Anti-Trust or Tax evasion cases."[8] A new trial was ordered after the jury no-caused

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Richmond's claim, much like Foreman Granderson's here, that "past societal discrimination alone can serve as the basis for rigid racial preferences," or, worse yet, "racial politics."

[8] Juror No. 1 wrote a letter to the Chief Judge of the United States District Court for the District of New Jersey shortly after serving on a jury that no-caused plaintiff in a private anti-trust case. This letter recites in part:

> "Due to far reaching political issues; polyglot, socialist and communist Federal legislation has become prevalent to the point where it stands out as the 'Essence of Conflict' & is extremely discriminatory & prejudicial. I am not an attorney, Socialist or Communist & it is not my purpose to attempt to formulate a paradox for the courts of the U. S. I just wish to emphasize that while a Federal law exists allowing Labor Union Racketeers to dictate wages & working conditions (by force), I will never render a decision in favor of a Plaintiff in Anti-Trust or Tax evasion cases. As far as I am concerned the 'Labor law' is 'Ipso Facto' & should allow an employer engaged in I.C. the privilege of anything he sees fit! I have no money but by Heritage I am a Capitalist & American!
>
> " 'Yours respectfully
> " '(Signed) Wm. F. Murphy
> " 'Juryman No. 1.' "

194 F. Supp. at 110. "Hearings were had, juror Murphy was examined at length by counsel and the court, and briefs were submitted." *Id.* Judge Meaney's opinion concludes:

plaintiff in a private anti-trust suit. Said the district court: "since the principles of justice are universal . . . the same requisites of proper administration of justice must exist in principle for all legal proceedings, civil or criminal. Therefore the same high standards for jurors must be adhered to in civil litigation as prevail in criminal trials." *Id.* at 110, *cert. denied*, 368 U.S. 920 (1961). Your Honors have said the same thing: "The Due Process Clause entitles a person to an impartial tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

The California Supreme Court has not blinked its eyes to juror affidavits reciting racism affecting the verdict: "For example, foreman Caruthers declared that the plaintiff was a 'black woman' and that 'where he came from, they don't "even let a black woman into the courtroom." ' " *Weathers v. Kaiser Foundation Hospitals*, 485 P.2d 1132, 1139 (Cal. 1971). A jury verdict against plaintiff was set aside; a new trial was ordered. *Accord, Singletary v. Lewis*, 584 So.2d 634 (Fla. 1st D.C.A. 1991). The California Supreme Court affirmed "on the sole basis of concealment of juror bias on *voir dire*." *Id.* at 1140. The Court

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> "The court is of the opinion that Murphy's deep-seated prejudice against plaintiffs under federal laws, including the anti-trust laws, antedated or at least coexisted with the trial of this action. Under the circumstances Murphy's impartiality is so seriously open to question that the court in its discretion will set the verdict aside and order a new trial."

Id. at 111. By way of stark contrast, no discretion was exercised, no hearing was held, and no consideration of Granderson's racial bias and impartiality was made by the courts below on ENSIDESA's due process claim.

reasoned: "Since the verdict was nine to three, the disqualification for bias on any one of the majority jurors could have resulted in a different verdict." *Id.* The verdict against ENSIDESA was nine to two. And beyond mathematics, the California Supreme Court recited (*id.*):

> "The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the Constitution."

Surely ENSIDESA's due process right to an unbiased jury is as solemn.

Whether Lord Mansfield's rule[9] must sometimes yield to due process is worthy of this Court's renewed attention: "But cases might arise in which it would be impossible to refuse [affidavits of jurors] without violating the plainest principle of justice." *United States v. Reid*, 12 How. 361, 366 (1851) (per Taney, C.J.). *Accord, Clyde Mattox v. United States*, 146 U.S. 140, 148 (1892). "This might occur in the gravest and most important cases," *McDonald v. Pless*, 238 U.S. 264, 268 (1915).

The Louisiana Court of Appeal's interpretation of Article 606(B) as absolutely barring judicial consideration of ENSIDESA's affidavits, regardless of the invidious bias shown, raises a substantial unresolved constitutional question[10] of vital significance affecting the continuing

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[9] *Vaise v. Delaval*, 1 T.R. 11, 99 Eng. Rep. 944 (K.B. 1785).

[10] *Liteky v. United States*, No. 92-6921, argued here November 3, 1993, involves an analogous question of outside influence and judicial bias under 28 U.S.C. § 455(a).

administration of justice in state and federal courts throughout the land.

CONCLUSION

"The obvious difficulty with prejudice in a judicial context is that it prevents the impartial decision-making that . . . fundamental fair play require[s]." *United States v. Heller*, 785 F.2d 1524, 1527 (11th Cir. 1986). This was Judge Elbert Tuttle's view, condemning racial bigotry in jury deliberations and ordering a new trial. "The people cannot be expected to respect their judicial system if its judges do not, first, do so." *Id.* at 1529.

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

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28 December, 1993

No. _____

In The

Supreme Court of the United States

October Term, 1993

EMPRESA NACIONAL SIDERURGICA, S.A.,

Petitioner,

v.

JERRY YOUNG,

Respondent.

Petition For A Writ Of Certiorari To The Louisiana Fourth Circuit Court Of Appeal

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JERRY YOUNG

versus

ARMADORES de CABOTAJE, S.A. AND K & B EQUIPMENT COMPANY, INC.

NO. 90-CA-1107

COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA

APPEAL FROM
CIVIL DISTRICT COURT, FOR THE
PARISH OF ORLEANS
NO. 84-17780, DIVISION "I"
HONORABLE BERNETTE. J. JOHNSON, JUDGE

JOAN BERNARD ARMSTRONG
JUDGE

(Court composed of Judge Charles R. Ward, Judge Joan Bernard Armstrong, and Judge Steven R. Plotkin)

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MAR 31 1993

**REVERSED IN PART;
AMENDED; AFFIRMED
AS AMENDED.**

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Before WARD, ARMSTRONG and PLOTKIN, JJ.

ARMSTRONG, Judge.

Defendants, Armadores de Cabotaje, S.A. ("ARCASA") and Empresa Nacional Siderurgica, S.A. ("ENSIDESA"), vessel owner and vessel charterer, respectively, appeal a trial court judgment awarding plaintiff, Jerry Young, a longshoreman, $1,700,000.00 in damages for personal injuries sustained while offloading the M/V LORENA. The trial court also dismissed cross-claims filed by ARCASA and ENSIDESA against each other.

ENSIDESA is a Spanish company which manufactures and ships steel from a port in Aviles, Spain, to, among other ports, the Port of New Orleans, Louisiana. This appeal centers around ENSIDESA's October 1982 shipment of a cargo of 60-foot steel "I-beams" to New Orleans aboard the M/V LORENA, a ship owned and crewed by ARCASA. ENSIDESA was the charterer of the M/V LORENA, as well as the shipper and owner of the steel beams transported on the ship. The agreement between the parties was a time charter, a contract by which the owner of a vessel lets a vessel to another person for a specified time or use. The owner continues to operate the vessel with its master and crew who remain servants of the owner.

The cargo of steel beams, which were banded together in bundles, was loaded aboard the M/V LORENA in the port of Aviles, Spain by ENSIDESA stevedores. The "I beams" were "stowed" in the "H" formation. That is, if one were looking at the end of the beams down their length, the ends resembled the letter "H". Beams may also be stowed so that the ends resemble the letter "I". Pieces of wood, or "dunnage," were placed between the layers or tiers of beams.

Cooper Stevedoring Company, Inc. ("Cooper"), had contracted with ENSIDESA to offload the steel beams in New Orleans. Plaintiff was a longshoreman employed by Cooper. The offloading began on November 21, 1982. Plaintiff was working in the hold of the ship with a work "gang" gathering and securing bundles of steel beams to be lifted out of the hold by a crane situated on a barge moored in the Mississippi River between the M/V LORENA and the dock. The members of plaintiff's gang,

including those working in the hold with him, the foreman, the "flagman" or man who signals the crane operator, and the ship "superintendent," were all Cooper employees. The crane being used to unload the steel was owned by Cooper, was situated on a barge owned by Cooper, and was operated by a Cooper employee. The off loading operation was under the sole direction of Cooper personnel without any assistance whatsoever from ENSIDESA or ARCASA personnel.

Present during the offloading were the longshoremen in the hold of the ship, including plaintiff, a foreman, and a flagman who positioned himself where he could observe the men in the hold and the crane. The operator of the crane manipulated the crane only at the direction of the flagman. The ship superintendent, the senior Cooper employee, was also present during the offloading.

The beams were in bundles and the men were lifting no more than three or four bundles at a time, apparently limited by the capacity of the crane. The deeper the men got into the hold, the more crushed they found the wooden dunnage. As a result of the crushed dunnage, bundles of beams were resting directly on the bundles underneath, rather than being separated by dunnage.

The unloading involved "breaking out" bundles of beams so that two chains could be pulled underneath and attached to each end of a "spreader bar" which was lowered by the crane. The spreader bar, here twenty feet long with cables and hooks attached at each end, allowed the crane to safely lift long cargo items, such as the sixty-foot beams, with two points of attachment. In the breaking out process, a "breakout wire," (cable), was slipped

approximately six inches under one end of the beams. A man in the hold would then signal the flagman who in turn would signal the crane operator who would lift the end of the beams up approximately three and a half feet so that a chain could be thrown underneath. Then, on a signal from the flagman, the crane operator would lower the beams. The process would then be repeated for the other end of the beams. The two chains would be wrapped around the beams, attached to the spreader bar cables, and the beams lifted out of the hold by the crane.

Normally, the dunnage separating the tiers of beams allowed the breakout wire to be slipped far enough under the beams so that the crane could safely lift the beams so the men could throw the chains underneath. However, the dunnage on the M/V LORENA was so badly crushed that many of the beams were resting on the ones underneath, making it impossible to get the breakout wire far enough underneath. So, the men had to "nip" the beams. "Nipping" involved getting the breakout wire as far under the beams as possible, sometimes just under the edge of one beam. Often, such as on this occasion, pry bars would be used to separate the beams so that the breakout wire could be inserted. After putting the wire under the edge of the beams, on signal, the crane operator would lift the beams slightly, and a longshoreman standing by would place a piece or pieces of dunnage under the beams. The crane would lower the beams and, ideally, the dunnage would support them until the relaxed breakout wire could be moved further underneath so that the ends of the beams could be safely lifted and the chains thrown underneath. One witness testified that sometimes it might be necessary to nip the beams

three or four times before getting the wire far enough under the beams to lift them and throw the chains underneath.

In the mid-afternoon hours of November 22nd, the second day of offloading, the men proceeded to nip some beams which were resting on the tier of beams underneath. Plaintiff's job was to place a piece or pieces of dunnage under the beams when the crane lifted them up. The breakout wire was placed as far under the edge of the beam as the men could get it. They signalled to the flagman who signalled to the crane operator to lift up. As the crane began to lift up and the breakout wire tighten [sic], the wire suddenly popped off. The spreader bar began wobbling, swinging the attached breakout wire. The flagman shouted for the men to run but as plaintiff attempted to get out of the way he was struck with the breakout wire or cable and fell, resulting in his sustaining personal injuries.

The case revolves around the condition of the stow. That is, the condition presented by the badly crushed dunnage, requiring the longshoremen to nip the edge of the beams in order to breakout the beams. It is undisputed that the manner in which the beams were stowed, i.e., stacked in the "H" configuration, with the edges resting on the wood dunnage, resulted in the dunnage being crushed to a much greater extent than it would have been had the beams been stowed in the "I" configuration. The edges of beams stowed on the "H" tend to cut the wood.

There was conflicting testimony regarding the safety of the stow. Plaintiff, himself, offered no testimony that

the stow was particularly dangerous. He said the work was basic longshoring work – offloading steel. He had used the tools, a pry bar and breakout wire, for years, and had off loaded that type of cargo before. He confirmed that he had used a breakout wire many times on steel stowed like that on the M/V LORENA. According to plaintiff, it was a typical workday, nothing out of the ordinary.

There was testimony by plaintiff in an earlier deposition that he had thought perhaps the boom of the crane had moved, causing the breakout wire to slip off the beams and subsequently strike him. He also stated in a deposition that he thought the cause of the accident may have been the longshoremen trying to lift out too many bundles of beams at one time, i.e., more than four. At trial he explained that these were the things he thought may have contributed to or caused the accident; but that he didn't know the cause. Other witnesses, however, testified that the boom of the crane did not move just prior to the accident, and that the men were not trying to lift out more than four bundles of beams at the time of the accident.

The foreman of plaintiff's work gang on the day of the accident, who was retired at the time of trial, viewed a photograph of the M/V LORENA's cargo hold and testified that he saw nothing dangerous about the stow. He had seen that type of stow many times before, and said it was a "perfect," "safe" stow. He said the people who loaded the steel beams knew what they were doing. He said he would have stopped the work if he had seen something unsafe while the plaintiff and the other men were offloading the vessel.

An ENSIDESA employee, Mr. Garcia, the director of a private section of the Port of Aviles, Spain, testified that in 1982 *all* steel beams loaded at the Port of Aviles were loaded in the "H" method. They did not begin loading in the "I" method until 1983. He later stated that from 1956 to 1985, 29 years, ENSIDESA loaded steel beams on the "H." From 1985 to the time of trial, April 1989, 80% of the steel beams ENSIDESA loaded were stowed on the "H." Only 20% of steel beams, bound for the United States and Canada, were loaded on the "I." Today, if a customer requests it, ENSIDESA loads steel beams using the "I" method. This is done primarily for ships bound for the United States and Canada. Garcia stated that United States and Canadian buyers request that beams be stowed on the "I" because they arrive in better condition. He testified that the loading longshoremen were following instructions of an ENSIDESA employee, but that the master of the vessel works with an ENSIDESA employee, the chief of port operations, to work out a stowage plan prior to loading a vessel. The longshoremen follow that plan when loading the vessel. Garcia also admitted that it is harder to offload steel beams in the "normal" way when the dunnage is crushed. He vaguely mentioned that one can use a "gigantic clamp," a device apparently used in some unnamed other ports, *not* the Port of New Orleans.

Another ENSIDESA employee, Captain Cazon, the chief of port operations for the Port of Aviles, testified that he supervised stevedoring operations at that foreign port. He said that before October 1982 he had loaded steel beams on the M/V LORENA using the "H" method. He was still loading ships that way at the time of trial, and stated that to his knowledge, ENSIDESA had never

received any complaints from anywhere in the world that the "H" stowage method was dangerous or unsafe to unload. He admitted, however, that United States and Canadian companies had requested that ENSIDESA load steel beams using the "I" method.

Cazon testified that he and ENSIDESA employees prepare stowage plans with the master or captain of the vessel, who must approve the plans; the captain of the vessel has the last word with regard to the method of the stow. When he prepares plans Cazon takes into consideration the safety of the stow. Part of his duty is assuring that the cargo is stowed in a manner which will be safe to persons handling the cargo. Cazon admitted that, although one of the reasons for using dunnage is to separate the tiers of beams to facilitate offloading, loading the beams using the "H" method results in more destruction of dunnage than loading by the "I" method. The witness also admitted that the loading of steel beams in the "I" method takes no more time than loading them in the "H" method and said that the cargo is less likely to be damaged by compression if the "I" method is used. But, he said it's safer for the beams to be stowed in the "H" method because the cargo is less likely to shift during transit, although he admitted that all beams are more stable if bundled together, which, in the instant case were.

Douglas Lemott, a longshoreman since 1974, was working with plaintiff offloading the M/V LORENA at the time of plaintiff's accident. Lemott testified that at the time of the accident they were approximately halfway down into the hold of cargo and were breaking out steel

beams which were resting on each other – "sort of interlocked" – a condition resulting from wood dunnage being crushed by the "sharp edges" of the "H" loaded beams. He stated that he was handling the breakout wire and, because of the crushed dunnage, getting it under the edge of the beams "was dangerous." He said that it was a dangerous stow. Lemott admitted that whether stowed on the "I" or on the "H," it is expected that dunnage is more compressed as they get farther down into the load. He further admitted that after plaintiff's accident, which occurred on the second day of offloading, they finished offloading the vessel, despite the condition being worse after plaintiff's accident. Lemott also stated that beams stowed in the "I" position sometimes fall over.

John Porter, a longshoreman for 26 years at the time of trial, was also working with plaintiff at the time of the accident. He said the dunnage higher up was in good condition but as you got farther into the hold it was more "chopped up," with beams resting on beams. He said it was a dangerous stow. Porter mentioned to his foreman that the dunnage was getting worse, but was told to take his time and he careful. He said he had seen beams stowed both in the "H" and "I" positions "hundreds of times," and had offloaded cargoes loaded both ways. He said from a safety standpoint there was nothing that could be done – the beams had to be offloaded.

Glen Reibe, the Cooper ship superintendent, said that steel beams were usually loaded in the "I" position. He said that there was nothing Cooper could do to correct the situation with regard to the manner of stow. They just had to be careful unloading the steel. He said the stow

was dangerous, although he did not stop the offloading because of that danger.

Joseph Johnson, an 18-year Cooper employee, was the Director of Regional Loss Control for the stevedoring company. Also known as a "safety man," he checked those vessels which Cooper was unloading twice a day. He said the dunnage on the M/V LORENA was crushed as a result of the beams being stowed on the "H." He said, "for all practical purposes it might as well have not been there." According to Johnson, the only thing Cooper could do regarding the stow was to work it in the safest manner possible. He admitted that he believed the cargo could be safely offloaded.

Sam Douglas, another career longshoreman – 21 years on the job at the time of trial – testified that he had unloaded steel beams during his career, but "very seldom" beams stowed on the "H". He said the normal method of stowing beams is on the "I," and he generally offloaded cargoes of beams stowed in that manner. He said that beams stowed on the "H" crush the dunnage and therefore you cannot get the breakout wire under the beams. Douglas was confronted with a statement signed by him reflecting that he had previously reported to a defense investigator that photographs of a vessel loaded with steel beams stowed on the "H" showed beams stowed the only way he has ever seen them stowed. Although Douglas testified that he can write, the statement had been written by the investigator. Douglas maintained that he didn't read the statement before signing it, and that he couldn't recall saying what was contained in the statement.

Plaintiffs presented as a witness, Albert Ross, a "marine surveyor." Ross was accepted as an expert in the area of marine surveying and as an expert in safety regarding stevedoring operations.[1] Ross testified that he could not recall ever seeing a ship stowed with steel beams in the "H" manner. He stated that between 1972 and 1977, as a port captain at the Port of Antwerp, Belgium, he had supervised the loading of steel beams in the "I" method. In November 1982 he was hired by Cooper to inspect the condition of the cargo of steel beams on the M/V LORENA. He testified that the beams were stowed in the "H" position and there was considerable damage to the cargo, i.e., bending and flange damage, primarily due to compression of the dunnage. He said the cause of the compression was the weight of the beams together with the method of stow – on the "H." Ross said it was a "hazardous" and "dangerous" stow – not a "correct" stow.

On cross-examination Ross said he had never been a stevedore or longshoreman. He couldn't recall whether he told the Cooper ship superintendent that he thought the stow was dangerous. He was aware that the foreman of plaintiff's gang thought the cargo was in perfect condition. Although he first stated that he could not recall ever seeing a "full" vessel loaded with beams on the "H," on cross-examination he said that in February 1982 he may have surveyed the M/V LORENA which was loaded with

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[1] Defendants raise as an assignment of error the trial court's qualification of Ross as expert regarding stevedoring operations, as well as the trial court's exclusion of an expert liability witness, Peter Duffy. See discussions, *infra*.

beams stowed on the "H." Finally, he admitted that he may have surveyed three other vessels which apparently were stowed with beams loaded on the "H." Finally, he admitted that he did not know whether the condition of the stow had anything to do with the accident.

The trial court found that ARCASA, as the vessel owner, and ENSIDESA, as the charterer and/or loading stevedore, were both negligent, their negligence being a factual and legal cause of plaintiff's damages. Fault was assessed at 15% to ARCASA and 85% to ENSIDESA. The trial court subsequently denied motions for judgment notwithstanding the verdict and for new trial filed by both ARCASA and ENSIDESA. Both defendants now appeal.

LIABILITY OF ARCASA

ARCASA's primary assignment of error is that the evidence was insufficient to support a finding that it was negligent and that such negligence was a cause of plaintiff's injuries.

We first address the applicable standard of appellate review. Federal jurisdiction over 33 U.S.C.A. § 905(b) claims is based upon the general maritime law. 28 U.S.C.A. § 1333(a); *Russell v. Atlantic & Gulf Stevedores*, 625 F.2d 71 (5th Cir.1980). State courts have concurrent jurisdiction with federal courts to hear LHWCA cases by virtue of the "saving to suitors" clause of 28 U.S.C.A. § 1333(1); *Bynum v. Patterson Truck Lines, Inc.*, 655 F.2d 643 (5th Cir.1981); *Allen v. Keeney*, 442 So.2d 1171 (La.App. 1st Cir.1983), *writ denied*, 445 So.2d 1232 (La.1984). State courts apply their own system for reviewing factual

determinations of juries in general maritime law and LHWCA cases. *Simmons v. Hope Contractors, Inc.*, 517 So.2d 333 (La.App. 1st Cir.1987), *writ denied*, 518 So.2d 510 (La.1988).

The question of negligence in a maritime case is a question of fact for the jury. *Randolph v. Laeisz*, 896 F.2d 964 (5th Cir.1990). Louisiana appellate jurisdiction extends to review of questions of law and fact in civil cases. La. Const. art. 5, §§ 5 and 10. On appellate review, a court may not disturb the factual findings of a judge or jury unless those findings are clearly wrong. *Rosell v. ESCO*, 549 So.2d 840 (La.1989); *Arceneaux v. Domingue*, 365 So.2d 1330 (La.1978); *Canter v. Koehring Co.*, 283 So.2d 716 (La.1973).

Plaintiff, a longshoreman, is covered under the Longshoreman's and Harbor Workers' Compensation Act ("LHWCA").[2] Under § 905(b) of the LHWCA, a longshoreman injured on a vessel may recover damages for those injuries from the vessel owner under a negligence theory.[3] § 905(b)'s "vessel" includes a time charterer such

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[2] 33 U.S.C.A. §§ 901 *et seq.*

[3] 33 U.S.C.A. § 905(b) provides in relevant part:

> In the event of injury to a person covered under this chapter caused by the negligence of the vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedor-

as ENSIDESA. See, 33 U.S.C.A. § 902(21); *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842, 846 n. 3 (5th Cir.1989), *certiorari denied, Sammiline Co., Ltd. v. Woods*, 493 U.S. 1050, 110 S.Ct. 853, 107 L.Ed.2d 847 (1990). In the seminal case of *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981), the U.S. Supreme Court defined the duties owed by a vessel owner to the stevedore and his longshoremen. These duties were succinctly stated by the 5th U.S. Circuit Court of Appeal in *Hill v. Texaco*, 674 F.2d 447, 450-51 (5th Cir.1982):

> First, *before the stevedore begins his work*, a shipowner must exercise care to make safe the portions of the ship that it turns over to the stevedore. In discharging this duty the ship may rely on the stevedore's performing its task with reasonable care. The shipowner must also warn the stevedore of hidden unsafe conditions on the ship of which the ship is or should be, aware.
>
> Second, *once the stevedore begins its operations*, the shipowner has no general duty to supervise work or to inspect the area assigned to the stevedore, unless custom, contract, or law imposes such a duty on the shipowner. The shipowner need not monitor the stevedore's operations; rather, the shipowner is entitled to

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ing services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.

> rely on the stevedore's expertise and reasonableness.
>
> Third, the Supreme Court made an exception to the general absence of a duty of the shipowner to protect employees of the stevedore *during cargo operations.* The duty arises when two conditions are fulfilled. *If* the shipowner becomes aware during the stevedore's work that the ship or its gear poses a danger to the longshoremen, and *if* the shipowner also learns that the stevedore is acting unreasonably in failing to protect the longshoremen against the danger, then the shipowner acquires a duty to intervene and protect the longshoremen. The shipowner can have knowledge of a defect if the defect develops during the stevedore's operations and the shipowner had actual knowledge, or if the defect exists at the outset and the ship 'must be deemed' to have knowledge of it.
>
> (footnotes omitted) (emphasis ours)

In *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir.1981), the U.S. Fifth Circuit described the judicial balancing of supervisory duties between the vessel owner and the stevedore:

> The shipowner is therefore responsible for eliminating dangerous conditions which exist at the outset of the stevedoring operations, but has 'no duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations.' It is the stevedore who must see to the safety of cargo operations. (citations omitted)

Id. at 115.

In *Lemon*, the court held that a vessel owner could be liable under *Scindia* if it knew or should have known of an improper loading technique and failed to take actions to either correct the stowage or warn the offloading stevedore's employees of the dangerous condition contained in the stow. *Lemon*, 656 F.2d, at 116. In *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296, 299 (5th Cir.1984), the same court, citing *Lemon*, again held that a vessel owner could be held liable for negligently stowed cargo which caused an offloading longshoreman to be injured. See in accord, *Woods v. Sammisa Co., Ltd., supra.*

As in *Lemon* and *Harris*, we are concerned in the instant case not with conditions which develop *after* offloading stevedoring operations begin, but with a condition present when the vessel is turned over to the stevedore. The alleged negligence "occurred in the method and manner of stowing cargo that was delivered to the longshoremen and stevedore." *Harris, supra* at 299. Therefore, although the alleged dangerous condition caused by the crushed dunnage on the M/V LORENA became more apparent as the longshoremen got deeper into the stow, the second and third *Scindia* duties are not relevant to our analysis. The primary burden contemplated by *Scindia* was the duty of the vessel owner to turn over to the offloading stevedore a vessel which could be offloaded with reasonable safety. This is the focus of our analysis.

One dispositive issue is whether the stow was dangerous. To find ARCASA negligent the jury had to find that the stowage of the steel beams resulted in a dangerous condition, a condition which made it more probable than not that the longshoremen could not offload the

vessel with reasonable safety. There were considerable testimony adduced at trial regarding this issue, much of it conflicting. The jury was faced with accepting the testimony of those witnesses who stated that the stow was dangerous or those maintaining that it was not. That is, the jury was faced with a credibility call. In *Rosell v. ESCO, supra,* the Louisiana Supreme Court stated the rule of appellate review when considering findings based upon credibility calls by the factfinder. The court stated:

> When findings are based on determinations regarding the credibility of witnesses, the manifest error – clearly wrong standard demands great deference to the trier of fact's findings; for only the factfinder can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said. Where documents or other objective evidence so contradict the witness's story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable fact finder [sic] would not credit the witness's story, the court of appeal may well find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination. But where such factors are not present, and a factfinder's finding is based on its decision to credit the testimony of one of two or more witnesses, that finding can virtually never be manifestly erroneous or clearly wrong. (citations omitted)

549 So.2d at 844-45.

In the bulk of cases dealing with dangerous stows, the issue of whether the condition is actually dangerous appears to be one of fact. See, *Harris v. Flota Mercante*

Grancolombiana, S.A., supra; *Woods v. Sammisa Co., Ltd., supra.* In the instant case, as in *Woods v. Sammisa,* defendants argue that the stow was not unreasonably dangerous or out of the ordinary. In addressing this argument in *Woods,* the U.S. Fifth Circuit, referring to *Harris,* stated:

> [In *Harris*], evidence that a stow was "dangerous" and "very, very poor[]" was held to be sufficient to support a jury finding of negligence; we did not require that the record contain testimony, almost of a talismanic quality, that the stow be "unreasonably" dangerous or that the cargo could not be discharged with "reasonable" safety. We similarly refuse to do so here.
>
> Whether a stowage method is reasonable depends upon a myriad of factors, including the absolute and relative danger which it presents vis-a-vis other stowage methods, and the feasibility of such other methods. In essence, the question is how a reasonable vessel interest exercising due care would allow the cargo to be stowed, and what it would conclude about its stowage methods.

In *Woods,* the plaintiff was injured breaking out steel pipe at the Port of New Orleans. Pipe bound for Houston, Texas overlapped pipe being offloaded in New Orleans. Commenting on the sufficiency of the evidence for a finding of negligence on the part of vessel owner, the court stated:

> [T]here was ample testimony in this case to support a jury finding that the overlapping condition of the cargo meant that the New Orleans pipe could not be discharged with reasonable

> safety. Testimony at trial indicated that an overlapping stow was unusual, that it increased the risk of damage to the cargo and injury to the longshoremen, and that those risks could have been avoided by either stowing the Houston pipe without having it overlap the New Orleans pipe – as was contemplated by the cargo plan prepared for the time charterer – or unloading the overlapping Houston pipe before unloading the New Orleans pipe. In sum, there is ample evidence from which a jury could conclude that the defendants therefore did not exercise reasonable care in providing the longshoremen with a reasonably safe place in which to work. (footnotes omitted)

The duty owed by the vessel owner is measured with regard to an "expert and experienced" stevedore exercising "reasonable care." *Woods v. Sammisa*, 873 F.2d at 851. The evidence supports the finding that plaintiff and his fellow longshoremen were expert and experienced stevedores exercising reasonable care at the time of the accident.

In the instant case, there was credible testimony to substantiate the factual conclusion that, although it was common for steel beams to be stowed on the "H," that method of stowage increased the risk of damage to the cargo and injury to the longshoremen. The testimony supports the conclusion that the risks to the plaintiff and other longshoremen could have been greatly reduced, if not almost completely eliminated, by stowing the beams using the "I" method of stow, and perhaps, using harder wood as dunnage. The "I" method of stow was just as feasible as the "H" method. The benefits of the "I" stow

far outweighed the *only* problem mentioned, i.e., the possibility that the beams stowed on the "I" might be damaged as a result of the cargo shifting. But, even regarding this factor, one of ENSIDESA's own employees stated at one point that stowing beams on the "I" actually reduced the risk of damage to the cargo. The evidence further supports the conclusion that the vessel owner, ARCASA, knew or should have known that this method of stow presented these risks to longshoremen. That is, "a reasonable owner/operator . . . would have perceived the dangers presented by the [stow]." See *Woods v. Sammisa*, 873 F.2d at 852. The evidence furnishes support for a finding that it was more probable than not that ARCASA's conduct contributed to plaintiff's accident and resulting injuries. We are unable to say that the trial court was clearly wrong in finding that ARCASA was at fault in causing damage to plaintiff.

Evidence that the danger of the stow was open and obvious is no defense to liability here under the first *Scindia* duty. *Treadaway v. Societe Anonyme Louis-Dreyfus*, 894 F.2d 161, 167 (5th Cir.1990); *Woods v. Sammisa*, 873 F.2d at 852-53; *Stass v. American Commercial Lines, Inc.*, 720 F.2d 879, 882 (5th Cir.1983); accord *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. at 176, n. 22, 101 S.Ct. at 1626, n. 22; see also, *Fernandez v. M/V Rio Limay*, 572 So.2d 730, 733 (La.App. 4th Cir.1990), *writ denied*, 575 So.2d 397 (La. 1991).

LIABILITY OF ENSIDESA

Under the facts of this case, the duty owed under *Scindia* by ARCASA is not significantly different than that

owed by ENSIDESA under *Scindia*. Based upon the evidence, we are unable to say that the jury would have been clearly wrong to conclude that a "reasonable . . . time charterer would have perceived the dangers presented by the [stow]." See, *Woods*, 873 F.2d at 852. In addition, ENSIDESA, as loading stevedore, clearly bears responsibility for the dangerous condition presented by the beams which it stowed. ENSIDESA breached its duty of reasonable care under all of the circumstances, in failing to load the vessel so that it could be offloaded with reasonable safety.

JURY INSTRUCTIONS

ENSIDESA and ARCASA submit that the trial court erroneously submitted certain theories of liability under *Scindia* when there is no evidence in the record to support them. Defendants cite *Woods v. Sammisa Company, Ltd, supra*, for the proposition that such an error mandates a remand for a new trial.

La.C.C.P. art 1793(C) states:

> A party may not assign as error the giving or the failure to give an instruction unless he objects thereto either before the jury retires to consider its verdict or immediately after the jury retires, stating specifically the matter to which he objects and the grounds of his objection. If he objects prior to the time the jury retires, he shall be given an opportunity to make the objection out of the hearing of the jury.

In the instant case, ENSIDESA and ARCASA failed to make a proper objection as required by La.C.C.P. art. 1793(C), and therefore waived their right to raise as an

assignment of error the giving of these jury instructions. Moreover, this assignment of error relates to theories of liability involving a hidden danger, one that is not open and obvious. The evidence is undisputed that, as the longshoremen got deeper into the hold and were breaking out the beams, the condition of the stow – the crushed dunnage and interlocking bundles of beams – was open and obvious to them. Unlike the situation in *Woods v. Sammisa, supra,* we are confident that the jury did not find defendants liable based upon either of the theories involving a hidden danger.

DIRECTED VERDICT

ENSIDESA assigns as error the failure of the trial court to grant its motion for a directed verdict pursuant to La.C.C.P. art. 1810. The denial of a motion for directed verdict is an interlocutory order and is not appealable. *Adams v. Pourciau,* 417 So.2d 860, 862 (La.App. 4th Cir. 1982), *writ denied,* 422 So.2d 157 (La.1982). Moreover, under the well-accepted rule for review of judgments granting directed verdicts, there was "substantial evidence" such that "reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions." Thus the motion was properly denied. *Oppenheim v. Murray Henderson Undertaking Co., Inc.,* 414 So.2d 868 (La.App. 4th Cir.1982).

MOTION FOR J.N.O.V. AND NEW TRIAL

ENSIDESA and ARCASA assign as error the failure of the trial court to grant a judgment notwithstanding the

verdict (J.N.O.V.), or in the alternative, a new trial. A J.N.O.V. should be granted only when the evidences is so overwhelming that no reasonable juror could reach any other conclusion. Further, the trial court cannot consider issues of credibility in reaching its decision. *Fernandez v. General Motors Corp.*, 478 So.2d 999, 1001 (La.App. 4th Cir.1985), *reversed on other grounds*, 491 So.2d 633 (La.1986); *McClain v. Holmes*, 460 So.2d 681, 682 (La.App. 1st Cir.1984), *writ denied*, 463 So.2d 1321 (La.1985).

Considering the evidence, and our finding as to ENSIDESA's and ARCASA's liability, we are unable to say that the trial court erred in denying their motions for J.N.O.V. as to liability. For reasons later discussed, the issue of the J.N.O.V. as to damages is moot.

As to the motions for new trial on the ground that the judgment appeared "clearly" contrary to the law and evidence, La.C.C.P. art. 1972(1), for the foregoing discussed reasons, we find no error on the part of the trial court in failing to grant ENSIDESA or ARCASA a new trial on the issue of liability. Nor do we find any merit to the argument that the trial court abused its discretion by not granting a new trial under La.C.C.P. art. 1973, which provides that the trial court "may" grant a new trial if there is good ground therefore.[4]

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[4] ENSIDESA's argument that a new trial was mandated under La.C.C.P. art. 1972(3), on the ground of jury misconduct, will be addressed later in this opinion.

MOTION TO CONTINUE

ENSIDESA raises as an assignment of error, the trial court's failure to grant its motion to continue the trial, filed at 2:53 p.m. on Friday, April 14, 1989, less than three days before the Monday, April 17th start of trial. ENSIDESA moved for a continuance to enable it to arrange for an independent medical examination of plaintiff after it allegedly discovered new evidence that plaintiff had been involved in a gunfight in 1986, and received gunshot wounds "that significantly impact[ed]" his medical condition. ENSIDESA claimed that information about the gunshot wounds had never been provided to it despite repeated discovery requests. The motion was denied on the day of trial, April 17th.

In December 1987, plaintiff was examined on behalf of ENSIDESA by Dr. James Laborde, an orthopedist. During the course of this examination X-rays were taken. Dr. Laborde confirmed that the X-rays revealed bullet fragments, including one large fragment in the upper chest region, and another in the area of plaintiff's jaw bone. Dr. Laborde could not recall whether he asked plaintiff about these bullet fragments. Dr. Laborde subsequently discussed his evaluation of plaintiff with counsel for ENSIDESA, and the information is contained in his report.

Dr. Rennie Culver, a psychiatrist, was called as a witness by ENSIDESA. In September 1988, plaintiff was examined by Dr. Culver on behalf of plaintiff's employer, Cooper Stevedoring. During the examination, plaintiff informed Dr. Culver that he had been shot in 1986 and had surgery in connection with the gunshot wound. This

information was contained in Dr. Culver's report. Dr. Culver was called as a witness by counsel for ENSIDESA, and questioned extensively about the history – or lack of it – given to him by plaintiff. ENSIDESA knew or should have known of the information in Dr. Culver's report about the gunshot wound(s).

A continuance *shall* be granted in cases where the moving party shows that he has been unable, with the exercise of due diligence, to obtain evidence material to his case. La.C.C.P. art. 1602. Even assuming arguendo that ENSIDESA did not discover that plaintiff had been wounded in a 1986 gunfight until shortly before trial as it claims, considering the foregoing, we are unable to say that it exercised due diligence in discovering this information. It apparently had this information in its possession, or access to it, long before the date set for trial.

A continuance *may* be granted if there is a good ground therefor. La.C.C.P. art. 1601. A trial court's decision to grant or deny a motion for continuance will not be disturbed by an appellate court absent a clear showing of abuse of discretion. *Heap v. Weber Const. Co. of Louisiana, Inc.*, 407 So.2d 799 (La.App. 4th Cir.1981); *Clay v. Clay*, 467 So.2d 166 (La.App. 3rd Cir.1983). For the foregoing reasons, we are unable to say that the trial court clearly abused its discretion in denying ENSIDESA's motion for a continuance to enable it to schedule an examination of plaintiff relating to the residual effect of the gunshot wounds on his physical condition.

MEDICAL EXAMINATIONS

ENSIDESA raises as an assignment of error the trial court's cancelling of two medical examinations it had scheduled for plaintiff on April 7 and 10. These examinations were scheduled on March 27, 1989, three weeks before trial. Plaintiff maintains that he learned of these scheduled examinations on March 30, 1989. Plaintiff subsequently filed a motion requesting that the trial court cancel the examinations. The trial court did not give any reasons for its granting of plaintiff's motion and cancellation of the examinations. Apparently, it was because the examinations were set 10 and 7 days before the April 17 trial was to begin.

La.C.C.P. art. 1464 authorizes a trial court to order a party to submit to a physical examination. The regulation of medical examinations is subject to the broad discretion of the trial court. *Amoco Production Co. v. Columbia Gas Transmission Corp.*, 455 So.2d 1260, 1265 (La.App. 4th Cir.1984), *writs denied*, 459 So.2d 542, 543 (La.1984). Absent a clear showing of abuse, the court's rulings on discovery will not be disturbed. *John Jay Esthetic Salon, Inc. v. Woods*, 422 So.2d 456 (La.App. 5th Cir.1982).

Defendants maintain that the physical examinations were necessary because plaintiff's treating physician, Dr. Watermeier, had only recently made any mention of his carpal tunnel syndrome and they had to respond to this. However, Dr. Watermeier stated in a November 1987 deposition that he had made a "working diagnosis" that plaintiff was suffering from carpal tunnel syndrome, though further tests were needed to confirm this diagnosis. Thus, ENSIDESA was alerted to the possibility of a

claim for carpal tunnel syndrome some 16 months before the date set for trial. If it wished to rebut such a claim, it should have had plaintiff examined by its physician at an earlier date. Considering this evidence, we are unable to say that the trial court clearly abused its discretion in granting plaintiff's motion to cancel the medical examinations which had been scheduled by ENSIDESA.

We are also unable to say that the trial court abused its discretion in failing to grant ENSIDESA's alternative motion for a continuance. See La.C.C.P. arts. 1972, 1973, and discussion *supra*.

STRIKING OF ENSIDESA'S LIABILITY EXPERT

In addition to learning on March 30, 1989 of the two scheduled medical examinations, plaintiff also learned that ENSIDESA planned to call Peter Duffy as an expert on the issue of liability. His testimony would have concerned the alleged dangerousness of the stow aboard the M/V LORENA. Plaintiff objected to the admissibility of this expert's testimony on the grounds that it was too close to trial to add an expert whose testimony would go to the issue of liability. The trial court struck the witness and ENSIDESA applied for writs of certiorari or review to this court. A divided panel of this court denied ENSIDESA's application for writs.[5]

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[5] A denial of an application for writs of certiorari or review does not preclude reconsideration of the same issue on appeal, and there, reaching a different conclusion as to it. *State v. Fontenot*, 550 So.2d 179 (La.1989); *State v. Jenkins*, 558 So.2d 800 (La.App. 5th Cir. 1990). See also *Gulf Utilities Co. v. Dixie Elec. Mem. Corp.*, 248 La. 458, 179 So.2d 637 (1965).

Plaintiff filed his original petition in October 1984, naming ARCASA as a defendant. In August 1985 he filed an amended petition naming ENSIDESA as a party defendant. This was almost four years before trial, and ENSIDESA's notification that it would call Peter Duffy as an expert on the issue of liability. Plaintiff apparently had no knowledge of this witness until March 30, 1989, less than three weeks before trial. Under these circumstances, we are unable to say that the trial court abused its inherent and wide discretion in refusing to allow Duffy to testify.

In addition, defendants presented the substance of Duffy's testimony through other witnesses, albeit fact witnesses, not opinion witnesses. Thus, it does not appear that they were substantially prejudiced by the exclusion of his testimony.

TESTIMONY OF PLAINTIFF'S LIABILITY EXPERT

ENSIDESA and ARCASA filed motions in limine to strike the testimony of plaintiff's liability expert, A.A. Ross, a marine surveyor, who testified extensively about the condition of the stow. The trial court denied the motions, and defendants raise the denial as an assignment of error.

Defendants maintain that Ross testified beyond his expertise; that he was not qualified to testify to the matters he did. Ross was a "marine surveyor," and had been one since 1977. He was hired by Cooper to inspect the

cargo of steel beams aboard the M/V LORENA for damage before offloading operations began. He was a graduate of the Nautical College of Scotland and had sailed on ocean going general cargo vessels for fifteen years, rising to commanding officer. He had been a "port captain" for a company that chartered ships and loaded steel out of Antwerp, Belgium. His duties as a port captain included planning the loading of the vessel and working with the master of the vessel loading the ship. He testified that he had supervised both the loading and offloading of steel beams. Ross had previously testified as an expert regarding safety considerations in the handling, loading, and offloading of cargo.

La.C.E. art. 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto, in the form of an opinion or otherwise.

The trial court accepted Ross as an expert in the area of marine surveying and in safety regarding stevedoring operations. Defendants object to Ross's qualifications because he had never been a stevedore or a longshoreman, and had not testified as a "safety expert" before. Also, he was hired only to inspect the condition of the cargo. A trial court is vested with wide discretion in determining the competency and qualification of expert witnesses. *Denton v. Mammelli,* 447 So.2d 75 (La.App. 4th Cir.1984). Its decision will not be disturbed absent a finding that is clearly wrong as a matter of law. *Frank L. Beier*

Radio, Inc. v. Brown, 453 So.2d 656 (La.App. 5th Cir.1984), *writ denied*, 458 So.2d 121 (La.1984).

Ross's experience as a port captain, loading and off-loading ships, qualified him as an expert regarding stevedoring operations. Considering Ross's qualifications, we are unable to say that the trial court abused its wide discretion in qualifying him as an expert in the area of marine surveying and safety regarding stevedoring operations. Also, for the previously discussed reasons, we find no merit to ARCASA and ENSIDESA's argument that the trial abused its discretion by refusing to allow them to present Peter Duffy's testimony to rebut that given by Ross.

SUBSEQUENT REMEDIAL MEASURES

ENSIDESA claims that the trial court erred in allowing plaintiff to cross-examine its liability witnesses about a change in the way ENSIDESA loaded steel beams after plaintiff's accident. Several ENSIDESA witnesses, foreign employees of the company, testified that in 1983 ENSIDESA began loading steel beams on the "H" at the request of customers, notably U.S. and Canadian companies.

La.Code of Evidence art. 407 states:

> In a civil case, when, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This Article does not require the exclusion of evidence of subsequent

> measures when offered for another purpose, such as proving ownership, authority, knowledge, control, or feasibility of precautionary measures, *or for attaching credibility.* (emphasis added)

Comment (b) to La.C.E. art. 407 states that this article applies if the substantive law underlying the case is based on some concept of negligence or culpable conduct. Thus, as ENSIDESA submits, the article governs the admissibility of this evidence. In questioning its witnesses, ENSIDESA brought out that there had never been a complaint by a customer about beams stowed on the "H." It was also brought out that ENSIDESA continues to use an "H" stow today, which is true. However, the questions on direct were asked, and the answers given, without mention of the routine loading of steel beams on the "I" since 1983 for U.S. and Canadian bound vessels. The cross examination of these witnesses on the issue of the post-1982 loading of beams on the "I" was directed to the credibility of these witnesses.

We find no merit to ENSIDESA's argument that this evidence was prohibited under La.C.E. art. 407.

OPINION TESTIMONY OF LAY WITNESSES

ENSIDESA raises as an assignment the giving of opinion testimony by plaintiff's lay witnesses, fellow longshoremen, as to the safety of the stow. Plaintiff points out that several lay defense witnesses testified as to the same issue. La.C.E. art. 701 provides that a lay witness may give an opinion if it is:

(1) Rationally based on the perception of the witness; and

(2) Helpful to a clear understanding of his testimony or the determination of a fact in issue.

The opinion testimony of plaintiff's lay witnesses meets the criteria set forth in La.C.E. art. 701. Their opinions as to the safety of the stow were rationally based on their perceptions and their experience as longshoremen. Their opinion testimony was helpful to the determination of the primary fact in issue with regard to liability, the safety of the stow.

EXCLUSION OF PLAINTIFF'S CRIMINAL RECORDS

ENSIDESA raises as an assignment of error, the trial court's refusal to allow plaintiff's criminal records into evidence. This assignment of error is raised but not briefed.

Under La.C.E. art. 609 evidence of the conviction of a crime punishable by death or imprisonment for more than six months is admissible for impeachment purposes if the trial court determines that the probative value of the evidence outweighs its prejudicial effect to a party. Only the date of the conviction and the name of the crime for which the witness was convicted is admissible under the article. Evidence of the arrest, indictment, or prosecution of a witness is not admissible for impeachment purposes.

Plaintiff's criminal records proffered by ENSIDESA reflect that he has been convicted of first offense possession of marijuana and first offense carrying a concealed

firearm, both punishable by imprisonment for up to six months. Also proffered was an application for a search warrant to search plaintiff's residence for stolen property, and an inventory form listing a number of items recovered in the search. However, there is no record of plaintiff having been convicted of any crime in connection with the stolen property. Therefore, nothing about plaintiff's criminal history as reflected by the proffered records was admissible under La.C.E. art. 609.

JURY MISCONDUCT

ENSIDESA claims that the trial court erred in failing to grant its motion for a new trial based on jury misconduct. La.C.C.P. art. 1972(3) mandates the granting of new trial where the jury has "misbehaved improperly so that impartial justice has not been done." La.C.C.P. art. 1972 allows the trial court to grant a new trial if there "is good ground therefore."

Following trial, ENSIDESA obtained affidavits by three jurors who stated that during deliberations one juror repeatedly urged a verdict on grounds other than the evidence adduced at trial. The juror allegedly stated that plaintiff should prevail because he was a lone individual fighting corporations. Some of his remarks also allegedly appealed to racial bias and prejudice. One juror-affiant stated that after deliberating almost ten hours, the jurors finally "gave in" to this particular juror out of frustration, and "more than doubled the amount of what would have been their verdict."

La.C.E. art. 606(B) states:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether any *outside influence* was improperly brought bear upon any juror,. . . . Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes. (emphasis added)

Under La.C.E. art. 606(B), the affidavits of these three jurors as to matters or statements made by this particular juror during deliberations are clearly inadmissible to question the validity of the jury verdict.

Prior to Louisiana's adoption of the Code of Evidence, a body of law allowed affidavits such as those offered by ENSIDESA for the limited purpose of showing that a juror responded untruthfully on voir dire. *Bennett v. Sedco Maritime*, 520 So.2d 894, 904 (La.App. 3rd Cir.1987); *Rains v. Diamond M. Company*, 396 So.2d 306, 315 (La.App. 3rd Cir.1981), *writ denied*, 399 So.2d 623 (La.1981), *cert. denied*, 455 U.S. 938, 102 S.Ct. 1427, 71 L.Ed.2d 648 (1982).

ENSIDESA argues that the affidavits are admissible to show that the juror in question violated his "oath of impartiality." However, the exception cited is not to be employed where the alleged untruthful statement was a

general one that the juror could render an impartial verdict. *Bennett, supra; Ryals v. Home Insurance Company,* 410 So.2d 827 (La.App. 3rd Cir.1982), *writs denied,* 414 So.2d 375, 376 (La.1982).

ENSIDESA's argument is directed only to an alleged general statement by the juror that he could be impartial. Thus, the affidavits cannot be considered. ENSIDESA makes no other allegation to jury misconduct. Therefore, we find no error by the trial court in denying ENSIDESA's motion for a new trial based upon jury misconduct. We are also unable to say that the trial court abused its discretion under La.C.C.P. art. 1973 in failing to grant a new trial on discretionary grounds based on conduct by the jury, or in failing to annul the judgment because it was obtained by ill practice.

FAULT OF PLAINTIFF'S EMPLOYER

ENSIDESA claims that the trial court erred in failing to submit an interrogatory as to the fault of plaintiff's employer, Cooper Stevedoring Company.

In the instant case, plaintiff was receiving benefits under the Longshore and Harbor Workers' Compensation Act, (LHWCA) 33 U.S.C.A. § 901 *et. seq.* His exclusive remedy against Cooper was under the provisions of the LHWCA. There is no provision under the LHWCA providing for the apportionment of fault to an employer. In fact, it has been held that in an action under 33 U.S.C.A. § 905(b), the issue of an employing stevedore's negligence should not be submitted to the jury. *Samuels v. Empresa Lineas Maritimas Argentinas,* 573 F.2d 884 (5th Cir.1978).

La.C.C.P. art. 1812(c)(2) provides that a trial court may submit an interrogatory to a jury inquiring whether any person other than the plaintiff was at fault, and if so the percentage of fault. See *Lemire v. New Orleans Public Service, Inc.*, 458 So.2d 1308 (La.1984). However, In both *Guidry v. Frank Guidry Oil Co.*, 579 So.2d 947 (La.1991), and *Melton v. General Electric Co., Inc.*, 579 So.2d 448 (La.1991), the Louisiana Supreme Court rejected the idea that in a suit by an employee against a third-party tortfeasor, La.C.C.P. art. 1812(c)(2) allowed a trial court to submit an interrogatory to a jury regarding an employer's fault. The court held that consideration of an employer's fault would offend a basic principle of the worker's compensation scheme, that an employer is liable only for compensation benefits, not tort damages. The principles underlying both the Louisiana Worker's Compensation Act and the LHWCA are the same regarding employer fault. La.C.C.P. art. 1812(c)(2) does not require the submission of an interrogatory to the jury as to the fault of an employer in a suit against third-party tortfeasors under the LHWCA.

ENSIDESA next submits that the trial court erred in failing to disclose Cooper's interest to the jury so that it could weigh the credibility of its employees who testified at trial. The record reflects that the trial court instructed the jury as to the relevance of Cooper's fault. The Cooper employees who testified at trial had nothing to personally gain from their testimony, although Cooper itself was seeking to recoup compensation benefits it had paid plaintiff. The jury was well aware that these men were plaintiff's fellow workers, a fact seemingly much more indicative of possible bias, than the fact that their

employer had a monetary interest in the outcome of the trial. Any evidence as to Cooper's claim for reimbursement was properly excluded on the ground that its probative value on the credibility of the witnesses was substantially outweighed by the danger of unfair prejudice to the plaintiff. La.C.E. art. 403.

CLOSING ARGUMENT

ENSIDESA submits that the trial court erred in failing to grant a new trial on the ground that the jury was "inflamed by plaintiff's counsel's clear breach of the 'Golden Rule' " during closing argument.

The "Golden Rule [Argument]" refers to an argument exhorting that the jury place itself in a party's shoes *with respect to damages. Duerden v. PBR Offshore Marine Corporation,* 471 So.2d 1111 (La.App. 3rd Cir.1985), *writ denied,* 476 So.2d 355 (La.1985); *Burrage v. Harrell,* 537 F.2d 837 (5th Cir.1976). The "Golden Rule" is limited to application in those cases where the exhortation is with respect to damages.

We first note that the record does not contain a transcript of the closing arguments of counsel. The record does reflect that counsel for ENSIDESA made an objection to remarks made by opposing counsel during closing argument. However, even at the time he made the objection, counsel for ENSIDESA stated that he couldn't recall exactly what was said. In its brief on appeal, counsel for ENSIDESA uses partial quotations of what opposing counsel allegedly stated. None of these partial statements directly implore jurors to put themselves in plaintiff's

shoes vis-a-vis his medical condition. The partial statements, even considering the context in which counsel for ENSIDESA places them, are not the type that would incite jurors to render a verdict based upon their emotions rather than the evidence. In addition, the trial court carefully instructed the jury that the statements of counsel were not evidence.

We find no merit to this assignment of error.

LIMITATION OF MEDICAL EVIDENCE

ENSIDESA claims that the trial court erred in refusing to allow it "to call Dr. Bogran to testify," and in prohibiting it from "using Dr. Bogran's report to properly cross-examine other physicians." Dr. Bogran treated plaintiff following a 1987 automobile accident.

The record does not substantiate ENSIDESA's assertion that the trial court refused to allow Dr. Bogran to testify. The issue of Dr. Bogran's treatment of plaintiff arose during the direct examination of ENSIDESA's expert psychiatric witness, Dr. Culver. Counsel for ENSIDESA sought to have Dr. Culver give an opinion as to the possibility of plaintiff malingering, based upon medical information contained in a report by Dr. Bogran. The court asked if Dr. Bogran was going to be called as a witness. Counsel for ENSIDESA responded that he was under subpoena, and indicated that he would be called "if necessary." The court responded that Dr. Culver might need to be recalled. The import of this colloquy was that the trial court was not going to allow questions of Dr. Culver regarding Dr. Bogran's report unless Dr. Bogran

would be called as a witness. Nowhere is there an indication that Dr. Bogran was not going to be allowed to testify.

The trial court allowed liberal examination of witnesses by both sides concerning findings and opinions of physicians who were not called to testify at trial. The trial court apparently felt that, because Dr. Bogran was under subpoena and available to testify, evidence as to his report would not be allowed. Dr. Bogran's report was technically hearsay, and therefore inadmissible as evidence. See *Jackson v. Tyson*, 526 So.2d 398 (La.App. 4th Cir.1988); *Hoofkin v. Bourne*, 469 So.2d 24 (La.App. 1st Cir. 1985). Under these circumstances we find no error with the trial court's decision not to allow questions by ENSIDESA of its own witness as to findings of Dr. Bogran as reflected in his report. Nor do find error in the trial court's refusal to allow into evidence Dr. Bogran's report without his testimony.

EVIDENCE OF UNRELATED PRIOR LAWSUIT

ENSIDESA next claims that the trial court erred in refusing to allow into evidence a petition filed by plaintiff, or his attorney, in connection with a 1987 accident. The suit, filed in First City Court for the Parish of Orleans, purportedly sought damages for personal injuries and property damage. Plaintiff was cross-examined as to the suit, and maintained that all he wanted out of the action was recovery for property damage to his vehicle. He said he knew nothing of a claim for personal

injuries. ENSIDESA sought to introduce the petition at the same time it tried to admit Dr. Bogran's report.

We are unable to say the trial court abused its discretion in disallowing the petition on the grounds that its relevancy was substantially outweighed by its prejudicial effect to plaintiff. La.C.E. art. 403.

TESTIMONY OF PLAINTIFF'S ECONOMIST

ENSIDESA next claims that the trial court erred in failing to strike the testimony of plaintiff's expert economist. ENSIDESA submits that the expert, Dr. Philip Jeffress, incorrectly included vacation and holiday benefits twice in his calculations of future and past wage loss. ENSIDESA cites further errors on the expert's part, such as "ignor[ing] the downturn in the local economy", "us[ing] an unrealistically low discount rate," and using "a legally improper work life expectancy."

A trial court is vested with wide discretion in determining the competency and qualification of expert witnesses. *Denton v. Mammelli,* 447 So.2d 75 (La.App. 4th Cir.1984). Its decision will not be disturbed absent a finding that it is clearly wrong as a matter of law. *Frank L. Beier Radio, Inc. v. Brown,* 453 So.2d 656 (La.App. 5th Cir.1984), *writ denied,* 458 So.2d 121 (La.1984).

Dr. Jeffress was cross-examined extensively as to his calculations. Any alleged inaccuracies were brought to the attention of the jury. Under these circumstances, and considering the discretion vested in the trial court in these matters, we are unable to say that it was error to refuse to strike the economist's testimony.

DAMAGES

Both ARCASA and ENSIDESA raise issues concerning the amount of damages awarded by the jury. Both ENSIDESA and ARCASA raise as an assignment of error, the trial court's failure to grant a remittitur. La.C.C.P. art. 1814. We will treat this as an assignment of error as to the excessiveness of the jury award. We have all of the facts before us to amend the verdict with respect to damages. The assignment of error as to remittitur is, for practical purposes, moot. If we found that the trial court erred in denying the motion for remittitur, it would offend the principles enunciated in *Gonzales v. Xerox Corporation*, 320 So.2d 163 (La. 1975), to remand for a new trial on the issue of damages when the facts are before us.

The jury awarded plaintiff $1,700,000.00 in damages, itemized as follows:

Future medical expenses;[6]	$ 300,000.00
Past physical and mental pain and suffering and disability from date of accident to date of trial;	$ 325,000.00
Future physical and mental pain and suffering and disability;	$ 450,000.00
Past loss of earnings or earning capacity from date of accident to date of trial;	$ 175,000.00
Future loss of earnings or earning capacity.	$ 460,000.00
TOTAL	$1,700,000.00

[6] The issue of past medical expenses was not submitted to the jury and is not at issue on appeal.

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1. *Causation:*

We first address the issue of causation. The jury determined that the fault of ARCASA and ENSIDESA contributed to plaintiff's damages. This is a question of fact. The finding of the jury as to causation of damages may not be disturbed by this court unless (1) the record evidence does not furnish a basis for such a finding, or (2) that finding is nevertheless clearly wrong. *Rosell v. ESCO*, 549 So.2d 840 (La.1989); *Arceneaux v. Domingue*, 365 So.2d 1330 (La.1978); *Canter v. Koehring, Co.*, 283 So.2d 716 (La.1973).

Plaintiff claimed both psychic and physical injuries. Dr. John Watermeier, an orthopedist, testified on behalf of plaintiff. Plaintiff had previously been seen by one of Dr. Watermeier's associates. Plaintiff's history reflected the November 1982 work-related injury and resulting hospitalization. Plaintiff apparently underwent diagnostic tests and conservative treatment following the accident, with no improvement, and Dr. Watermeier subsequently took over his treatment in April 1983.

Upon examination, plaintiff complained of "a lot of pain." He had pain in his back radiating down his leg. His objective findings were muscle spasm and limited range of motion in his back. Dr. Watermeier felt that the most probable cause of plaintiff's pain was a symptomatic or bulging disc in the lower back. He gave plaintiff achemopapain injection in April 1983, which appeared to have provided some relief for a week or so. In June 1983 plaintiff continued to complain of back and leg pain. He

walked with a severe limp and severe straight leg raising signs. Dr. Watermeier performed a lumbar laminectomy on June 24, 1983. He found a bulging disc irritating a nerve. Following discharge on June 28, plaintiff appeared to be doing better, although he still complained of back pain. Dr. Watermeier subsequently performed a spinal fusion on plaintiff in 1985.

It was Dr. Watermeier's opinion that the cause of plaintiff's low back pain was his November 1982 accident aboard the M/V LORENA. He said that a prior back injury sustained by plaintiff in 1980, for which he was apparently treated over a course of several months, was not the cause of his post-November 1982 problems. Dr. Watermeier stated that plaintiff would not have been able to work from 1980 to November 1982 with a herniated disc. He further stated that plaintiff had not complained of any leg pain in connection with the 1980 treatment, but did after the November 1982 accident. Plaintiff had also been treated over the years, as far back as 1968, for other minor injuries. Dr. Watermeier felt these injuries were not the cause of plaintiff's post-November 1982 problems. He also admitted that plaintiff had degenerative charges in his spine dating as far back as 1968, but again, this fact did not affect his opinion. Nor did he believe that a contusion to the cervical spine from a 1986 gunshot wound was the cause of plaintiff's current problems. Finally, told of plaintiff's September 1987 automobile accident, of which Dr. Watermeier was unaware, he stated that he saw plaintiff approximately two weeks after the 1987 accident and plaintiff had the same complaints as before. His opinion as to causation was primarily based upon the history given by plaintiff.

Dr. Watermeier stated that in September or December 1983 plaintiff complained of pain in his left wrist and left forearm. He admitted, however, that he didn't have much concern about the arm and wrist pain until October 1987. Dr. Watermeier stated that a review of plaintiff's records showed some injury to plaintiff's arm at the time of the November 1982 accident. He had made a "clinical diagnosis" of carpal tunnel syndrome, but not a "definitive diagnosis." On cross-examination he admitted that it was *not* his diagnosis that plaintiff has carpal tunnel syndrome.

In early 1984 Dr. Watermeier began giving plaintiff injections of Marcaine, a long-lasting anesthetic. These were administered monthly or bi-monthly. He also prescribed plaintiff 30-40 Percodan pain medication pills a month. In addition, plaintiff has been hospitalized several times for morphine epidurals. All of these were for treatment of plaintiff's complaints of pain. Dr. Watermeier saw plaintiff as continuing to suffer from pain in the future. He believed plaintiff will have to live with pain the rest of his life.

Dr. Watermeir testified that from 1983 when he first saw plaintiff, until July 1986, he considered plaintiff totally disabled. As of July 1986, he felt that plaintiff could work at some "light activity," but not as a longshoreman. On examination in May 1987 he found plaintiff totally disabled. From February 1988 until the time of the trial he said plaintiff was totally disabled. As of the time of trial, he thought plaintiff would have trouble even doing light duty work, but might be trained to perform some type of sedentary work.

Dr. Robert Newman, a psychiatrist, testified on behalf of plaintiff. Dr. Newman first saw plaintiff in April 1988. He treated plaintiff on a regular basis between April 1988 and September 1988. He didn't see plaintiff from late September to late January 1989, when he began treating him again. He continued to treat him at the time of trial, April 1989.

Dr. Newman diagnosed him as suffering from an adjustment disorder with depression; he also had a dependent personality, and a psychogenic pain disorder. The dependent personality was not something that, in Dr. Newman's opinion, resulted from the November 1982 accident. Based upon the history given him by plaintiff, Dr. Newman felt that plaintiff was depressed because he can no longer do longshoreman work. As a result of being unable to work because of his back problem, he said plaintiff suffers from a lack of self-esteem. His sense of self-worth was based primarily upon his ability to do heavy manual labor as a longshoreman. Thus, his psychological condition is a direct result of his 1982 accident aboard the M/V LORENA.

Dr. Newman prescribed an anti-depressant medication for plaintiff which he continued to take at the time of trial. He believed that plaintiff would need to continue to take the medication in the future. Dr. Newman didn't know the cost of the medication. Based on an extensive history given by plaintiff, Dr. Newman felt that plaintiff had not really been depressed before the November 1982 accident. Dr. Newman was referred to a 1980 report by another physician, an orthopedist, who found that plaintiff was depressed following a work-related injury which

prevented him from working. While Dr. Newman questioned whether an orthopedist was qualified to give a medical opinion as to depression, he admitted that if plaintiff couldn't work, he may well have been depressed. This is same reason he believed was the primary cause of plaintiff's depression after the November 1982 accident.

Dr. Newman believed that plaintiff's complaints of pain and numbness in his arm had a psychological basis. They were psychogenic in nature. He said he was not sure whether th : iow back pain was psychogenic. There were no objective symptoms accounting for the pain. Dr. Newman testified that he considered but rejected the possibility that plaintiff was malingering, even though plaintiff appeared to meet several criteria of a person malingering. Dr. Newman felt that plaintiff would not recover from the psychogenic pain disorder. He didn't believe working would "really help" plaintiff unless he could do the type of work he had done before the accident. The self-esteem he had achieved before the accident was largely built around a laboring job. Dr. Newman admitted, however, that it would help plaintiff if he found some employment. This was apparently not limited to work involving heavy manual labor.

Defendants presented an expert in the field of orthopedics, Dr. James Laborde. He evaluated plaintiff on behalf of ENSIDESA on December 7, 1987. Dr. Laborde took a history from plaintiff, took x-rays, and evaluated x-rays of plaintiff taken by others. He stated that the history and clinical diagnosis both pointed to nonorganic or psychogenic pain. However, he said that this diagnosis

of nonorganic pain did not rule out an underlying problem. He also found degenerative changes, arthritis, in plaintiff's spine. These were present in 1983-84 x-rays. He found no evidence of carpal tunnel syndrome in plaintiff's wrist. He felt that plaintiff could return to light-duty work.

On cross-examination by counsel for plaintiff, Dr. Laborde admitted that ordinary x-rays will not directly show a nerve or disc problem. He went on to say, however, that it was his opinion that even if there is an actual herniated disc or nerve impingement, you cannot tell whether that is causing pain. Dr. Laborde said that all lumbar discs bulge to some extent, with the degree of bulging gradually increasing with age as a part of the degenerative process. He said that there is no way to objectively determine whether a herniated disc is the result of a specific injury or a consequence of the normal degenerative process.

Dr. Rennie Culver, a psychiatrist, testified on behalf of defendants. Dr. Culver evaluated plaintiff on September 14, 1988. Dr. Culver, as did Dr. Laborde, saw plaintiff only once for examination in connection with this litigation. Neither of them ever treated plaintiff. Dr. Culver took a history of plaintiff and did a standard mental status examination. Dr. Culver stated that plaintiff only informed him of the November 1982 accident and the 1986 gunshot wounds. Dr. Culver's impressions were that plaintiff was suffering from depression, had a psychogenic or somatoform pain disorder, and had a dependent personality. This was the exact same diagnosis Dr. Newman made. Dr. Culver did not render an opinion regarding the possibility of plaintiff's malingering. A diagnosis

of malingering would have been inconsistent with Dr. Culver's diagnosis of somatoform or psychogenic pain disorder, which presupposes genuine symptoms of pain.

Dr. Culver testified that based upon the history given by plaintiff, the somatoform pain disorder first arose after plaintiff's November 1982 accident. But, he said he couldn't be certain; it could have arisen at any time. It was his opinion that the somatoform or psychogenic pain disorder resulted from plaintiff's depression. It was, he said, part of the depressive symptomatology. He also said that persons with dependent personalities were inclined to have psychogenic pain and were predisposed to depression. However, Dr. Culver agreed that the November 1982 injury was a cause of plaintiff's depression. He said that it appeared that following the injury, the quality of his functioning "decreased significantly," and he became more depressed.

Defendants directed their attack to plaintiff's creditability and the testimony of medical experts whose opinions rested largely on histories given them by plaintiff.

The jury had before it much evidence upon which to evaluate plaintiff's credibility on the issues of causation as to damages. The Louisiana Supreme Court addressed the role of an appellate court in reviewing factual determinations by juries made primarily on the credibility of witnesses in *Rosell v. ESCO, supra.* The court stated:

> When findings are based on determinations regarding the credibility of witnesses, the manifest error – clearly wrong standard demands great deference to the trier of facts' findings; for

> only the factfinder can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said. Where documents or objective evidence so contradict the witness's story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable fact finder would not credit the witness's story, the court of appeal may well find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination. But where such factors are not present, and a factfinder's finding is based on its decision to credit the testimony of one of two or more witnesses, that finding can virtually never be manifestly erroneous or clearly wrong.

Although the evidence showed that plaintiff had some minor injuries prior to his 1982 accident, including at least one to his back, the jury had before it evidence that his current condition was the result of the 1982 accident. Even if they had some effect, such as rendering plaintiff more susceptible to a subsequent injury, it is well-settled that a tortfeasor is responsible for the consequences of its tort even though those damages are greater because of pre-existing condition. *Reck v. Stevens*, 373 So.2d 498 (La.1979); *Kuck v. City of New Orleans*, 531 So.2d 1142 (La.App. 4th Cir. 1988).

Similarly, though there was evidence that plaintiff received three gunshot wounds in 1986, and was involved in an automobile accident in 1987 in which he may have received injuries, the evidence as a whole furnishes a basis for a finding that neither of these incidents was the cause of plaintiff's physical or psychogenic problems.

While the testimony of the medical experts conflicts in some areas, again we are unable to say that the evidence as a whole does not furnish a basis for the finding that the negligence of ARCASA and ENSIDESA caused damage to plaintiff, or that such a finding was clearly wrong. The issue for our consideration is the extent of damages.

However, while there is some evidence that plaintiff experiences pain in his arm, and that this pain could be related to his 1982 accident, the evidence does not furnish a finding that plaintiff has carpal tunnel syndrome. Dr. Watermeier, plaintiff's treating orthopedist, could state only that he had "an impression" that plaintiff was suffering from carpal tunnel syndrome. He had not made a definitive diagnosis. Also, Dr. Laborde, defendants' orthopedist, ruled out carpal tunnel syndrome. There was no other evidence that plaintiff was suffering from carpal tunnel syndrome. Therefore, the jury would have been clearly wrong in awarding any damages related to carpal tunnel syndrome.

2. *Special Damages:*

A. Future Medical Expenses:

Future medical expenses must be established with some degree of certainty. *Wilson v. Magee,* 359 So.2d 315 (La.App. 4th Cir.1978), modified on other grounds, 367 So.2d 314 (La.1979). However, an award of future medical expenses is in great measure highly speculative and not susceptible of calculation with mathematical certainty. *Edwards v. Sims,* 294 So.2d 611 (La.App. 4th Cir.1974),

reversed on other grounds by *Harris v. Tenneco Oil Co.*, 563 So.2d 317 (La.App. 4th Cir.1990).

Insofar as future medical expenses were concerned, Dr. Watermeier, plaintiff's treating orthopedist, saw a "possible" disc removal and bone graft fusion costing from $15,000.00 to $20,000.00. Another option, he said, were the $2,000.00 morphine epidurals every two months. He mentioned the Marcaine injections which he said plaintiff had been receiving, as of the time of trial, almost every month. He predicted plaintiff would need to continue receiving the Marcaine injections at $22.00 per injection. The jury could have reasonably awarded plaintiff future medical expenses in the amount of $20,000.00 for surgery, $22.00 per month for the future monthly Marcaine injections, and $2,000.00 every two months, or $12,000.00 per year, for morphine epidurals.

Dr. Watermeier testified that he expected that plaintiff would need to continue to see him every month or two at $34.00 a visit. He said that plaintiff's Percodan pain medication costs about $15.00 per month. Presumably, Dr. Watermeier felt that plaintiff would continue to need Percodans for the rest of his life, and continue to see him for the rest of his life. Dr. Watermeier did not personally give an opinion as to plaintiff's life expectancy.

Dr. Newman stated that plaintiff would need to be treated in the future. The only specific course of treatment mentioned was relaxation therapy at intervals of perhaps every two weeks for one-half hour at a time. The cost would be $82.50 per half hour. Presumably, this would be for the rest of plaintiff's life.

We will assume that plaintiff needs to continue seeing Dr. Watermeier every month at $34.00 per month, or $408.00 per year; that he will continue to need Percodans at $15.00 per month or $180.00 per year; that he will need Marcaine injections once a month at $22.00, or $264.00 per year; and that he would need therapy from Dr. Newman every two weeks for one-half hour at $82.50 a session or $2,145.00 per year. Add in the future morphine epidurals at $12,000.00 per year for a total annual expense of $14,997.00.

An expert economist presented by plaintiff testified that his work life expectancy was 10.1 years. The jury could have reasonably set his life expectancy at 70 years. Plaintiff was fifty-three years old at the time of trial, leaving 17 years of future medical expenses. His total annual future medical expenses for 17 years amounted to $254,949.00. Add to this the $20,000.00 for future surgery, for a total of $274,949.00. The jury awarded plaintiff $300,000.00. The award will be reduced to $274,949.00.

B. Past Loss of Earnings:

The jury awarded plaintiff $175,000.00 for past loss of earnings. Special damages for loss of earnings up to the time of trial should be calculated with a certain degree of mathematical certainty, and such awards are not subject to the much discretion rule applicable to general damages. See *Cookmeyer v. Langston,* 487 So.2d 525 (La.App. 4th Cir.1986); *Eddy v. Litton,* 586 So.2d 670 (La.App.2d Cir.1991); *writ denied,* 590 So.2d 1203 (La.1992).

Dr. Philip Jeffress testified as an expert economist for plaintiff. Dr. Jeffress calculated that plaintiff's total past

lost wages were $203,746.00. This figure was broken down into $141,365.00 for after tax wage losses, and $62,381.00 for non-wage benefits. The figure was based on an annual income of $25,585.00 per year, based upon plaintiff's 1980, 1981 and 1982 earnings as reflected by plaintiff's W-2 forms. Dr. Jeffress also stated that he considered what other similarly situated longshoremen were earning. He said he did not consider any type of pay raise in making his calculations.

The estimate was also based on a worklife expectancy of 10.1 years, a figure derived from Bureau of Labor Statistics, U.S. Department of Labor. In arriving at these figures Dr. Jeffress assumed that longshoring work would be available to plaintiff. The figures did not take into account any slowing of port activity at the Port of New Orleans. Finally, Dr. Jeffress admitted that his figures and calculations were based upon the assumption that plaintiff could not ever return to work of any kind. He stated that if plaintiff had worked, that income would be deducted from his figures.

The lost fringe benefits were calculated by considering collective bargaining agreements for a per hour based amount that the employer sets aside or contributes in fringe benefits for longshoremen. He then simply calculated the number of hours plaintiff would have worked and multiplied it times the fringe benefit hourly figure. However, when asked whether plaintiff's W-2 forms reflected vacation and holiday pay as earnings, Dr. Jeffress admitted that it looked like these amounts were included. He stated that if that was the case, his figures would have to be revised to take that into account. As

will be discussed below, defendants' presented testimonial evidence that holiday and vacation pay were included as earnings. However, Dr. Jeffress made no amended calculations taking that factor into consideration.

The defense presented a witness, Win Niemand, who was then employed by the New Orleans Steamship Association on its labor relations staff. In his position, Niemand negotiated with the International Longshoremans' Association in collective bargaining. Niemand testified that vacation and holiday pay appear as earnings on a longshoreman's W-2 form, and that plaintiff's 1982 W-2 form reflected just such a figure.

Niemand also testified concerning welfare (medical) pension benefits. The welfare benefits covered plaintiff and his dependents. Niemand testified that someone such as plaintiff, who had been a longshoreman since 1968 and worked a certain number of hours, would be entitled to contributions towards his welfare and pension plans after a November 1982 injury. These contributions to the welfare and pension funds would be made for a maximum of 400 weeks, 7.6 years, as long as the injured person is receiving worker's compensation benefits. His coverage under the welfare plan for he and his dependants would be the same, excluding payment of any medical expenses related to the injury, as if he were working full time. His pension benefits would continue to accrue as if he were working full time.

Niemand also computed the amounts plaintiff would have earned between the time of his accident and the

time of trial based upon average hours worked by longshoremen in general, and average hours worked by plaintiff in previous years. Niemand's calculations were significantly lower than those by Dr. Jeffress. For instance, using contract years running from October through September, he calculated that plaintiff would have earned $12,000.00 in 1986-87, and $13,000.00 in 1987-88. He said these figures took into account slow port activity and fewer average hours worked by longshoremen.

Defendants also presented an expert economist, Dr. Kenneth Boudreaux, who testified that plaintiff's past loss earnings amounted to $53,373.80. His figures included a reduction in the number of hours worked by longshoremen.

The jury could have reasonably found sufficient evidence to accept the figure supplied by Dr. Jeffress as to plaintiff's past lost wages in the amount of $141,365.00. We are unable to say that such a determination would be clearly wrong. However, it was established that Dr. Jeffress incorrectly included as lost fringe benefits holiday and vacation pay. Because he failed to amend his calculations to reflect this fact, the jury was clearly wrong in awarding the full amount of lost benefits which included holiday and vacation pay. The jury did not have sufficient evidence to determine what portion of Dr. Jeffress calculations for fringe benefits represented holiday and vacation pay. Therefore, plaintiff failed to establish the amount of lost benefits with any reasonable degree of mathematical certainty, and the jury erred in awarding any amount of damages for this loss. We will

amend the judgement to subtract the amount of $62,381.00 for loss of fringe benefits.

C. Future Loss of Earnings:

The jury trial found that plaintiff was entitled to $460,000.00 in damages for loss of future earnings. Before he can recover damages for future lost wages, a plaintiff must prove the loss with reasonable certainty. *Whatley v. Regional Transit Authority,* 563 So.2d 1194 (La.App. 4th Cir.1990), *writ denied,* 569 So.2d 965 (La. 1990). *See also, McGowan v. Sewerage and Water Board of New Orleans,* 555 So.2d 472 (La.App. 4th Cir.1989). However, such damages need not be proven with mathematical certainty. *Whatley v. Regional Transit Authority, supra.* Generally, a reviewing court should affirm the award if it can be reasonably supported under an interpretation of the evidence most favorable to the plaintiff. See *Bailes v. U.S.F. & G., Co.,* 512 So.2d 633 (La.App.2d Cir.1987).

Plaintiff's own expert economist, Dr. Jeffress', only calculated plaintiff's future lost earnings to be $281,475.00, $189,732.00 in lost wages and $91,743.00 in lost fringe benefits. There was no evidence to substantiate a greater award, and any jury award above that must be considered as unsupported by the evidence. In addition, Dr. Jeffress' calculation regarding fringe benefits were again incorrectly based on holiday and vacation pay not being included as wages on plaintiff's W-2 form.

Defendants' expert, Dr. Boudreaux, calculated plaintiff's future lost earnings to be $4,748.00. Dr. Boudreaux arrived at his calculations based on plaintiff having a shorter work life expectancy than projected by Dr.

Jeffress. Dr. Boudreaux also factored in plaintiff's being able to work at a job paying $4.10 per hour. This was apparently based on the testimony of Jennifer Palmer, a vocational rehabilitation counselor presented as a witness by defendants. Ms. Palmer felt that plaintiff would be qualified to work as a cashier or a bank messenger.

Again, as in reviewing the award for past loss of earnings, we believe the jury could have reasonably accepted Dr. Jeffress' testimony and awarded plaintiff $189,732.00 for future lost wages, but not the $91,743.00 for future lost fringe benefits. Dr. Jeffress made no amended calculations to account for holiday and vacation pay being included in plaintiff's W-2 wages. His original calculations were incorrect. The jury could not have speculated as to what percentage of the total amount for lost future fringe benefits was represented by the holiday and vacation pay improperly included in the total amount. There was insufficient evidence to award anything greater than $189,732.00 for future loss of earnings. The jury was clearly wrong in awarding more than that amount.

We will amend the judgment of the trial court to reduce the damages for future loss of earnings to $189,732.00.

3. *General Damages:*

The jury awarded plaintiff $325,000.00 in damages for past physical and mental pain, suffering and disability, and $450,000.00 for future physical and mental pain, suffering and disability. Defendants claim these damages are excessive and contrary to the law and evidence.

Before an appellate court can disturb a trial court's award of general damages, the record must clearly reveal that the trier of fact abused its discretion in making the award. Only after finding that the record shows that the trial court abused its discretion can be appellate court disturb the award, and then only to the extent of raising or lowering it to the highest or lowest point which would have been within the discretion afforded the trial court. *Coco v. Winston Industries, Inc.*, 341 So.2d 332 (La.1977); *Reck v. Stevens*, 373 So.2d 498 (La.1979); *Burton v. Berthelot*, 567 So.2d 649 (La.App.1990). Before an appellate court questions a trial court award as inadequate or excessive, it must look not to prior awards, but to the individual circumstances of the instant case. *Reck v. Stevens*, 373 So.2d at 501.

As a result of the accident plaintiff underwent a lumbar laminectomy and a spinal fusion. He has suffered significant pain since the accident and will continue to experience that pain the rest of his life. He takes pain medication prescribed by Dr. Watermeier and gets monthly injections to further relieve his pain symptoms. He has also had morphine epidurals, injections of morphine directly into his spine, to relieve pain. Dr. Watermeier testified that plaintiff cannot return to work as a longshoreman and would have trouble doing even light duty work because of his injuries. Dr. Newman's testimony supports the view that the accident and resulting injuries and complications have adversely impacted plaintiff's mental health, and will continue to do so the rest of his life. According to Dr. Newman, plaintiff's sense of self-worth was directly tied to his ability to earn a living as a longshoreman and provide for his family.

Plaintiff testified that he worked as a longshoreman from 1968 until his 1982 injury. He said he loved his job. After the accident he stopped getting along with his wife. He felt as if he could not get himself back together after the accident. Despite his two surgeries he still experiences pain.

Considering all of the evidence, however, we find the awards for both past and future general damages are a clear abuse of discretion. After reviewing awards made for similar injuries, we reduce both awards to $250,000.00, which we believe are the highest amounts that would have been within the discretion of the jury to award.

INDEMNIFICATION

The cross-claims of ARCASA, the owner of the vessel, and ENSIDESA, the charterer of the vessel, were severed and tried before the court without a jury. The trial court dismissed the claims of both parties. Both parties now appeal. We affirm the trial court's dismissal of the cross-claim filed by ENSIDESA, but reverse the dismissal of the cross-claim filed by ARCASA.

In support of its cross-claim for indemnity, ENSIDESA argues that ARCASA had officers and crew present during the offloading and submits that, if the discharge was unsafe, one of the ARCASA personnel had the opportunity and the duty to stop it. We reject this argument. The evidence shows that the cause of the accident was not the unsafe offloading of the cargo, but the loading and stowing of the cargo, for which the jury found ENSIDESA 85% at fault and ARCASA 15% at fault.

The evidence further showed that the cargo was being offloaded as safely as possible by the only means available. The trial court judgment dismissing ENSIDESA's cross-claim is therefore affirmed.

ARCASA, the owner of the vessel, bases its cross-claim for indemnity on the contract or standard GENCON charter party entered into by ENSIDESA and ARCASA. Part I, § 15 of the charter party agreement states, in pertinent part:

> Loading and discharging costs (state alternative (a) or (b) of CL. 5; also indicate if vessel is gearless)

In the box provided in Part I § 15 was typed "See clause 5(b)," indicating that the parties chose clause 5(b) of Part II of the charter party to govern their contractual rights and responsibilities insofar as the "loading and discharging costs." Clause 5 of Part II of the charter party provides;

> 5. **Loading Discharging Costs**
> (b) F.i.o. and free stowed trimmed
> The cargo shall be brought into the holds, loaded, stowed and or trimmed and taken from the holds and discharged by the Charterers or their agents, *free of any risk, liability and expense whatsoever to the owners.* (Emphasis added.)

The contract language quoted above unequivocally relieves ARCASA from any liability for injuries incurred during the loadings or offloading of the cargo in question. ENSIDESA nevertheless argues that the agreement should not relieve ARCASA from liability for the plaintiff's injuries in this case, citing *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842 (5th Cir.1989), in which a charterer was

held liable for injuries despite the following contract language based on Clause 8 of the New York Produce Exchange party:

> The Captain (although appointed by the Owners) shall be under the orders and directions of the charterers as regards employment and agency; and the charterers are to load, stow, trim and discharge the cargo *at their expense* under the supervision of the Captain who is to sign Bills of lading for Cargo as presented in conformity with the Mate's or Tally Clerk's receipts without prejudice to this Charter Party. (Emphasis added.)

We hold that the result in this case is not governed by *Woods* because the two agreements in question are vastly different on the question of liability for injuries incurred in loading and unloading cargo. The agreement in the instant case expressly provides that ARCASA is to be completely free of "risk, liability and expense," while the New York agreement in *Woods* refers only to expense, without making any reference to risk or liability. The different language demands a different result. ARCASA is entitled to indemnity from ENSIDESA for the 15% of the liability imposed by the jury for plaintiff's injuries.

Accordingly, the trial court judgment dismissing ARCASA's cross-claim against ENSIDESA is reversed. ENSIDESA is ordered to provide indemnity to ARCASA for its portion of the plaintiff's damages.

For the foregoing reasons, we reverse the judgment of the trial court in part, and amend it to order ENSIDESA to indemnify ARCASA for ARCASA's proportionate share of the damages awarded to plaintiff. We

further amend the judgment of the trial court to award damages, excluding past medical expenses, as follows:

Future medical expenses;	$ 274,949.00
Past physical and mental pain and suffering and disability from date of accident to date of trial;	$ 250,000.00
Future physical and mental pain and suffering and disability;	$ 250,000.00
Past loss of earnings or earnings capacity from date of accident to trial;	$ 141,365.00
Future loss of earnings or earning capacity.	$ 189,732.00
TOTAL	$1,106,046.00

We affirm the judgment as amended and in all other respects.

REVERSED IN PART; AMENDED; AFFIRMED AS AMENDED.

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 84-17780 DIVISION "I" DOCKET #4

JERRY YOUNG

versus

ARMADORES de CABOTAJE, S.A. and
K & B EQUIPMENT COMPANY

FILED:_____ _____

DEPUTY CLERK

AMENDED FINAL JUDGEMENT

This case was tried before a jury on April 17, 18, 19, 20, 21, 24, 25 and 26, 1989. On August 18, 1989, the Court heard the following motions filed by the parties: Motions for Judgment Notwithstanding the Verdict and for New Trial filed by defendants, Empresa Nacional Siderurgica, S.A. (ENSIDESA) and Armadores de Cabotaje, S.A. (ARCASA); Motion of ARCASA to Amend the Form of the Judgment; motions of the intervenors, Cooper Stevedoring Company, Inc. and the Home Indemnity Company, to recognize their lien. Having concluded that the jury's verdict is consistent with the law and the evidence, and having considered the memoranda and argument of counsel.

IT IS ORDERED, ADJUDGED AND DECREED, that:

1. In accordance with the finding of the jury that ARCASA was 15% at fault and ENSIDESA was 85% at fault, further in accordance with the court's finding that medical expenses incurred by petitioner from date of

injury until April 26, 1989 total $62,959.60, there be judgment rendered in favor of the plaintiff, Jerry Young, and against the defendants, ARCASA and ENSIDESA, jointly and *in solido,* for ONE MILLION SEVEN HUNDRED SIXTY TWO THOUSAND NINE HUNDRED FIFTY-NINE AND 60/100 ($1,762.959.60) DOLLARS, with legal interest thereon from April 26, 1989, until paid, and for all costs of the main demand; and

2. Prejudgment interest is awarded to plaintiff at the rate of 5% per annum on the amount of $562,959.60, the amount awarded by the jury for accrued damages, as well as the $62,959.60 in previously accrued medical expenses awarded by the court, to run from October 25, 1984 until April 26, 1989, totaling $126,665.91 which the aforesaid defendants are condemned to pay jointly and *in solido;*

3. The motions of ARCASA and ENSIDESA for judgment notwithstanding the verdict, or alternatively, for new trial, be hereby denied.

4. Cooper Stevedoring Company, Inc. (now known as Cooper/T. Smith Stevedoring, Co., Inc.) and the HOme Indemnity Company, intervenors in this action, be and hereby have a lien on the proceeds of the plaintiff's net recovery in this case, which lien includes $62,959.60 in medical expenses and $89,530.94 in weekly compensation benefits, for a total of $151,489.54 paid to and/or on behalf of the plaintiff as of April 14, 1989; and

5. The intervenors' lien shall also include all other compensation and medical benefits paid to and/or on behalf of the plaintiff since April 14, 1989, until the date

said lien is collected, together with legal interest to accrue as each payment is made; and

6. The cross-claims of ARCASA and ENSIDESA seeking indemnity and/or contribution from each other be dismissed, each party to bear it's own costs.

Judgement signed in New Orleans, Louisiana, this 24th day of August, 1989

(Sgd) Bernette J. Johnson
JUDGE BERNETTE JOHNSON

A TRUE COPY
/s/ Deanna C. Jones
DEPUTY CLERK, CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LA.

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 84-17780 DIVISION "I" DOCKET NO. 4

JERRY YOUNG

VERSUS

ARMADORES de CABOTAJE, S.A. and
K&B EQUIPMENT COMPANY

FILED:_____ _____
DEPUTY CLERK

FINAL JUDGMENT

(RECEIVED OCT 9 1989; ENTERED ON MINUTES)

On October 6, 1989 the Motion To Reconsider And For Remittitur was heard by the Court. Defendant, Armadores de Cabotaje, S.A. ("ARCASA"), had also joined in the motion of Empresa Nacional Siderurgica, S.A. ("ENSIDESA"). The Motion To Reconsider And For Remittitur was set for hearing on motion of plaintiff, Jerry Young.

Having considered the pleadings and the argument of counsel;

IT IS ORDERED, ADJUDGED AND DECREED that the Motion To Reconsider And For Remittitur is denied. No further motions will be considered by this Court and this judgment of the Court is final.

New Orleans, Louisiana this 6th day of October, 1989.
VERIFIED

(SS) Bernette J. Johnson
JUDGE BERNETTE JOHNSON

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 6th day of October, 1989, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by hand delivery.

/s/ Miles P. Clements
MILES P. CLEMENTS

THE SUPREME COURT OF THE STATE OF LOUISIANA

JERRY YOUNG

VS.

NO. 93-C - 1607

ARMADORES de CABOTAJE, S.A. AND K & B EQUIPMENT COMPANY, INC.

IN RE: Empresa Nacional SiderurgicaSA; – Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fourth Circuit, Number 90CA-1107; Parish of Orleans Civil District Court Div. "I" Number 84-17780

October 1, 1993

Denied.

HTL

PFC

JLD

JCW

PH

CDK

ROO

MARCUS, J., not on panel.

Supreme Court of Louisiana
October 1, 1993

/s/ Frans LaBranche, Jr.
Clerk of Court
For the Court

COURT OF APPEAL, FOUR CIRCUIT
STATE OF LOUISIANA

Clerk's Office, New Orleans, MAY 12 1993

DEAR SIR:

REHEARING WAS THIS DAY REFUSED IN THE CASE ENTITLED

JERRY YOUNG v. ARMADORES de CABOTAJE, S.A., ET AL

No. 90-CA-1107

Very truly yours,

DANIELLE A. SCHOTT
CLERK OF COURT

CIVIL DISTRICT COURT OR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 84-17780 DIVISION "L" DOCKET NO. 4

JERRY YOUNG

VERSUS

ARMADORES de CABOTAJE, S.A. and
K&B EQUIPMENT COMPANY

FILED:_____ _____
DEPUTY CLERK

ALTERNATIVE MOTION OF ENSIDESA
FOR A NEW TRIAL

(Filed May 23, 1989)

COMES NOW, Empresa Nacional Siderurgica, S.A. ("Ensidesa"), defendant in the above-styled and numbered cause, appearing through undersigned counsel, and, in an abundance of caution, alternatively moves this Honorable Court for a new trial, in the event that the Court is not inclined to grant Ensidesa's motion for judgment notwithstanding the verdict (which motion has been submitted), all as more fully appears in the memorandum attached hereto and filed simultaneously herewith.

Respectfully submitted,

LEMLE, KELLEHER,
KOHLMEYER, DENNERY,
HUNLEY, MOSS & FRILOT

By: /s/ Miles P. Clements
MILES P. CLEMENTS, #4184

2100 Pan-American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 586-1241

ATTORNEYS FOR EMPRESA
NACIONAL SIDERURGICA, S.A.

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 23d day of May, 1989, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by hand delivery.

/s/ Miles P. Clements
MILES P. CLEMENTS

CIVIL DISTRICT COURT OR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 84-17780 DIVISION "L" DOCKET NO. 4

JERRY YOUNG

VERSUS

ARMADORES de CABOTAJE, S.A. and
K&B EQUIPMENT COMPANY

FILED:_____ _____

DEPUTY CLERK

MEMORANDUM IN SUPPORT OF ALTERNATIVE MOTION OF ENSIDESA FOR A NEW TRIAL

(Filed May 23, 1989)

MAY IT PLEASE THE COURT:

Ensidesa submits that its motion for a JNOV must be granted. However, there are compelling reasons to order a new trial, in the event that this Court does not see fit to enter the JNOV. This motion, brought in the alternative, will discuss those reasons.

The very amount of the verdict, which included awards for elements of loss which far exceeded even the plaintiff's evidence, is perhaps the most compelling proof that the deliberations were not governed by a careful consideration of the evidence, but were instead the product of sympathy, prejudice and passion. Moreover, the comments of individual jurors made to counsel after the verdict was rendered confirm that the result was not properly reached. To put the verdict in perspective, the

Court should first consider the unique course and duration (a record for this section of Court) of the deliberations.

THE DELIBERATIONS

Upon the completion of argument at 11:30 A.M. on Wednesday, April 26, the eleven jurors advised Your Honor that they were ready to decide the case and did not need to take a lunch hour. Instead, they took a 15-minute coffee break, returned to the courtroom and received their instructions. At approximately 12:45 P.M. they retired to the empty courtroom at the other end of the third floor to deliberate. Mr. Everett W. Granderson, Jr. was initially elected to act as foreman and the deliberations immediately began in a confrontational manner as Mr. Granderson verbally attacked the other jurors, literally screaming. Through the afternoon and night, bystanders standing almost anywhere in the third floor hallway could hear the screaming. The other jurors were initially so upset by the aggressiveness of Mr. Granderson, that approximately one hour into the deliberations, Mr. Robert N. Jessup, Jr. was elected as foreman to replace Mr. Granderson. However, this reportedly only fueled the flames of Mr. Granderson's ire and he continued to make statements reflecting prejudice, bias, sympathy and passion.

Specifically, Mr. Granderson attacked the white jurors with statements that whites were unsympathetic to the black man's cause, that blacks had paid a price in coming over from Africa on ships and working as slaves and that the white race has not comprehension of what black men

have gone through. Mr. Granderson verbally attacked the female jurors with statements that they were inferior to men and were wishy-washy in making up their minds. He depicted corporations, including foreign corporations, as extremely powerful entities which unite together to run everything, and stated that Mr. Young should prevail as a lone individual fighting corporations. Mr. Granderson insisted that the plaintiff be awarded over $2,000,000.00 because corporations have millions of dollars in assets and that a $2,000,000.00 verdict would mean nothing to the corporate defendants.

Virtually all of the jurors believed that Cooper Stevedoring Co. was the real culprit and should be assessed anywhere from 80% to 100% fault. The jurors expressed confusion and concern that the interrogatories would not facilitate such a finding. The large percentage of fault assessed against Ensidesa apparently would not have been made had an interrogatory regarding Cooper's fault been propounded.

The deliberations continued, punctuated by Mr.. Granderson's aggressiveness and screams, until 8:30 p. m. when the Court recalled the jury to the courtroom and delivered a "dynamite charge". Included in the Court's instructions was the admonishment that the jurors should not be affected by prejudice, sympathy, or passion. Nevertheless, immediately upon returning to deliberate, Mr. Granderson continued to harass the other jurors. At that point, having had nothing to eat all day, most of the jurors became exhausted. By 10:00 p.m., many of the jurors stated that they were not only hungry and exhausted, but that they were concerned about their families and their jobs. In the last 15 minutes of deliberations,

most of the jurors simply gave in to Mr. Granderson's demands, simply as a means of ending the ordeal and going home. Consequently, in those last few minutes, the vast majority acquiesced and the verdict was more than doubled. Exhausted, and in many instances disgusted, the jury returned to the courtroom at 10:30 p.m. and gave its verdict awarding plaintiff $1,700,000.00, plus prejudgment interest accruing since 1982. The foreman and one other juror did not join in the verdict.

In view of their deliberations, and with the benefit of hindsight which is sharpened by the actual verdict, it is now clear that the jury should have been allowed to remain hung. Instead, by holding the jurors until they rendered a verdict of some kind, an unjust result was obtained.

* * *

CONCLUSION

Mr. Young's first trial may have been in some respects interesting, and in other respects controversial. No one can honestly say that it was fair, or that a just result was obtained. Accordingly, conditioned upon the denial of its motion for a JNOV, Ensidesa urges the Court to vacate the verdict and order a new trial.

Respectfully submitted,

LEMLE, KELLEHER,
KOHLMEYER, DENNERY,
HUNLEY, MOSS & FRILOT

By: /s/ Miles P. Clements
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ATTORNEYS FOR EMPRESA
NACIONAL SIDERURGICA, S.A.

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 23d day of May, 1989, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by hand delivery.

/s/ Miles P. Clements
MILES P. CLEMENTS

CIVIL DISTRICT COURT OR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 84-17780 DIVISION "I" DOCKET NO. 4

JERRY YOUNG

VERSUS

ARMADORES de CABOTAJE, S.A. and
K & B EQUIPMENT COMPANY

FILED_____ _____

DEPUTY CLERK

SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF OF MOTION FOR NEW TRIAL

(Filed June 14, 1989)

MAY IT PLEASE THE COURT:

INTRODUCTION

ENSIDESA submits this brief supplemental memorandum to address three additional reasons why a new trial is required:

1. The manifestly improper and egregious misconduct of juror Everett W. Granderson, Jr., including the patent violation of his oath to act as an impartial factfinder, violated ENSIDESA's state and federal rights of procedural due process. La. Cost. art. 1, § 2; U.S. Const. amend. XIV.

* * *

DUE PROCESS

It is a fundamental matter of procedural due process that a litigant be afforded a fair and meaningful opportunity to be heard. *See, e.g., Century Bank in New Orleans v. Doley*, 527 So. 2d 437, 438 (La. App. 4th Cir. 1988); *Hicks v. Schouest*, 381 So. 2d 977, 978 (La. App. 4th Cir. 1980). A necessary ingredient of the fair hearing aspect of due process is that jurors will respect above all their oath of impartiality and decide cases solely on the evidence presented. *See State v. Mejia*, 197 So. 2d 73, 76 (La. 1967) ("a fair trial in a fair tribunal is a basic requirement of constitutional due process.") (citing *Irvin v. Dodd*, 366 U.S. 717, 81 S. Ct. 1639 (1961)).

The attached affidavit of Robert N. Jessup, Jr. is replete with proof that one Everett W. Granderson, Jr., who initially served as foreman of the jury, violated his oath of impartiality. Mr. Jessup's affidavit attests to how juror Everett W. Granderson, Jr. violated his oath of impartiality, and attacked, intimidated and exhausted the other jurors. The consequence of Granderson's misconduct is that ENSIDESA was denied a fair hearing and deprived of procedural due process of law.

* * *

CONCLUSION

In conclusion, this is not a case where the Jury's deliberations can be described as merely irregular or as the epitome of vigorous debate and compromise. The jury in this case was poisoned by sympathy, prejudice and passion, to the extent that ENSIDESA's due process right

to a fair hearing was violated. Even if the jury's misconduct was not egregious enough to constitute a violation of procedural due process, article 1972 of the Louisiana Code of Civil Procedure requires, given the jury's improper behavior and the resulting manifest injustice, that a new trial be conducted. In the alternative, this court should exercise its discretion under article 2004 and annul this judgment on the grounds that the verdict was a product of ill practice.

Respectfully submitted,

LEMLE, KELLEHER,
KOHLMEYER, DENNERY,
HUNLEY, MOSS & FRILOT

/s/ Miles P. Clements
MILES P. CLEMENTS (#4184)
ANDREW S. de KLERK (#1045)
SAMUEL F. REYNOLDS, JR.
(#17226)
2100 Pan-American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
Telephone: 504/586-1241
COUNSEL FOR EMPRESA
NACIONAL SIDERURGICA, S.A.

CERTIFICATE

I do hereby certify that a copy of the above and foregoing Pleading has been delivered to all counsel of record, by hand, this 14th day of June, 1989.

/s/ Mile P. Clements

CIVIL DISTRICT COURT OR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 84-17780 DIVISION "L" DOCKET NO. 4

JERRY YOUNG

VERSUS

ARMADORES de CABOTAJE, S.A. and
K&B EQUIPMENT COMPANY

FILED:_____ _____

DEPUTY CLERK

AFFIDAVIT OF ROBERT N. JESSUP, JR.

(Filed June 14, 1989)

BEFORE ME, the undersigned notary, personally came and appeared, Robert N. Jessup, Jr., who, upon being first duly sworn, did depose and say that:

He was one of eleven (11) jurors who retired to deliberate at approximately 12:45 p.m. on April 26, 1989, in this case, and that he was elected to replace Everett W. Granderson, Jr. as foreman of the jury, approximately one hour after deliberations began;

Through the deliberations from beginning to end, statements were made by Mr. Granderson which were racist in nature and further demonstrated prejudice against corporations, foreign nationalities and gender;

Mr. Jessup and other jurors were confronted with accusations that they had no comprehension of what black men have had to go through, that they were unsympathetic to the black man's cause, and that blacks had paid a price for coming over on ships from Africa;

The female jurors were verbally attacked with accusations that they were inferior to men and were wishy-washy in making up their minds;

Mr. Granderson made statements depicting corporations, including foreign corporations, as extremely powerful, that corporations unite together and run everything and that Mr. Young should prevail simply beause he was a lone individual fighting corporations;

Mr. Granderson wanted to give the plaintiff an award in excess of $2,000,000.00 and stated that the jury should do so because the defendant corporations have many millions of dollars and that a verdict in excess of $2,000,000.00 would mean nothing to them;

The jury was hung until late in the night when many of the jurors stated that they were exhausted and hungry (the jurors had not eaten since a coffee break that morning), and simply grew too weary to continue to deliberate, further expressing concern about the care of their families and their jobs;

In the last 15 minutes of deliberations, after 10:00 p.m. on April 26th, in frustration the jurors gave in to Mr. Granderson and more than doubled the amount of what would have been their verdict;

Virtually all of the jurors did not understand why Cooper Stevedoring Company did not appear in the interrogatories such that they might apportion some percentage of fault to Cooper, he felt that Cooper was 100% at fault for Mr. Young's accident and that the comments of almost all of the jurors was that Cooper was at least 80% and as much as 100% at fault;

The large percentage of fault assessed against Ensidesa resulted because there was no interrogatory regarding Cooper's fault;

The statements during the course of deliberations reflected prejudice, sympathy and passion and the verdict was the result of same, rather than consideration of the evidence;

This Affidavit is true and correct and is made on the basis of his personal information, knowledge and belief.

/s/ Robert N. Jessup, Jr.
ROBERT N. JESSUP, JR.

Sworn to and subscribed
before me this 12th
day of May, 1989.

/s/ Paul A. Bello
NOTARY PUBLIC

CIVIL DISTRICT COURT OR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 84-17780 DIVISION "I" DOCKET NO. 4

JERRY YOUNG

VERSUS

ARMADORES de CABOTAJE, S.A. and
K & B EQUIPMENT COMPANY

FILED:_____ _____

DEPUTY CLERK

ENSIDESA'S REPLY MEMORANDUM TO PLAINTIFF'S OPPOSITION TO MOTIONS FOR J.N.O.V. AND NEW TRIAL AND TO ARCASA'S SUBMISSIONS ON THE CROSS-CLAIMS

MAY IT PLEASE THE COURT:

The purpose of this Reply Memorandum is threefold.

* * *

Second, now that a third juror, and a member of the majority, has executed an affidavit corroborating ENSIDESA's earlier arguments regarding jury misconduct, improper behavior and ill practices, a new trial is required on these grounds.

* * *

IV. JURY MISCONDUCT, IMPROPER BEHAVIOR AND ILL PRACTICES

In a supplemental memorandum in support of its motion for a new trial, ENSIDESA raised and briefly re-emphasizes here perhaps the most compelling reason for granting a new trial: the jury's misconduct, improper behavior and ill practices. ENSIDESA raises a number of additional matters and responds to the plaintiff's opposition memorandum in which plaintiff misstates and mischaracterizes ENSIDESA's position and the applicable law.

Along with its supplemental memorandum in support of its motion for a new trial, ENSIDESA submitted the affidavit of Robert N. Jessup, Jr., one of the eleven jurors who deliberated this case and who was elected to replace juror Everett W. Granderson, Jr. as foreman of the jury. Mr. Jessup's affidavit documents clearly how ENSIDESA was denied due process and impartial justice by a juror who forced upon the other jurors his sympathy and passion and more importantly his racial prejudice, as well as his prejudice against corporations, particularly foreign corporations. ENSIDESA subsequently submitted the affidavit of juror Gay Barbarin, who corroborates Mr. Jessup's account of Mr. Granderson's gross misconduct and offers some additional and particularly disturbing facts regarding racism and partiality. ENSIDESA now submits another juror's affidavit, namely that of Ms. Cynthia Gleason, which again highlights the fact that the deliberations were tainted. Because Ms. Gleason was a member of the majority her affidavit makes ENSIDESA's arguments much more cogent, it is submitted. The plain fact is that all three affidavits show that because of the

circumstances of the deliberations, the jurors' resistance was worn down and the verdict, instead of being the result of the impartial administration of justice, is the result of prejudice and bias, and ENSIDESA deserves a new trial on this basis. (Copies of these affidavits are attached hereto for the Court's ready reference, marked Exhibits 2, 3 and 4 respectively.)

ENSIDESA also must respond to certain of the plaintiff's misstatements and mischaracterizations. The plaintiff mischaracterizes the jury's behavior as merely irregular, when in fact ENSIDESA has submitted clear proof of the type of egregious behavior that unquestionably offends due process and prevents the impartial administration of justice. ENSIDESA's complaints are far more serious and vital to the administration of impartial justice than the problems examined in the cases that the plaintiff cites. For example, the issue in *Blandino v. Brown Erection Company, Inc.*, 341 So. 2d 577, 579 (La. App. 2nd Cir. 1977) was whether improper behavior could arise from the presence on the jury of a highly opinionated person. And in *Gormley v. Grand Lodge of State of Louisiana*, 503 So. 2d 181 (La. App. 4th Cir. 1987), the issue was whether a law clerk's conduct – entering the jury room to determine and communicate to the judge the juries difficulties with interrogatories – sufficiently affected the neutrality of the court such that a new trial was necessary; but there the law clerk acted merely as a messenger and the court held that a new trial was unnecessary.

ENSIDESA also takes issue with the plaintiff's misstatements regarding how an aggrieved litigant may properly document jury misconduct. The plaintiff leads

the court to believe that the court cannot consider affidavits offered from jurors in this case, citing *Cosie v. Aetna Casualty Insurance Company*, 527 So. 2d 1105 (La. App. 1st Cir. 1988) and Article 606(B) of the new Louisiana Code of Evidence. What the plaintiff omits from his discussion is the commonly recognized exception to the exclusion of jurors' affidavits. The federal rule, from which Article 606(B) materially derives, allows an exception for statements which tend to show deceit during voir dire. *See, e.g., Hard v. Burlington Northern R.R.*, 812 F. 2d 482, 484-85 (9th Cir. 1987); *Maldonado v. Missouri Pacific Ry. Co.*, 798 F. 2d 764, 770 (5th Cir. 1986). The affidavits which ENSIDESA offers fall precisely within this exception. These affidavits show that juror Granderson grossly violated his oath of impartiality and disregarded the Court's instructions with regard to the law's equal treatment of persons of any race and corporations of any size or nationality. In light of the grave due process questions arising from this jury's impartiality and misconduct, ENSIDESA urges the court to consider the matter fully and grant ENSIDESA a new trial on account of jury misconduct, improper behavior and ill practices.

* * *

Respectfully submitted,

LEMLE, KELLEHER,
KOHLMEYER, DENNERY,
HUNLEY, MOSS & FRILOT

/s/ A. S. de Klerk
MILES P. CLEMENTS (#4184)
ANDREW S. de KLERK (#1045)

2100 Pan-American Life Center
601 Poydras Street
New Orleans, Louisiana 70130
Telephone: 504/586-1241
COUNSEL FOR EMPRESA
NACIONAL SIDERURGICA, S.A.

CERTIFICATE

I do hereby certify that a copy of the above and foregoing Pleading has been delivered to all counsel of record, by hand, this 11th day of August, 1989.

/s/ Andrew S. de Klerk
ANDREW S. de KLERK (#1045)

EXHIBIT 3

CIVIL DISTRICT COURT OR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 84-17780 DIVISION "I" DOCKET NO. 4

JERRY YOUNG

VERSUS

ARMADORES de CABOTAJE, S.A. and
K & B EQUIPMENT COMPANY

FILED:_____ _____
DEPUTY CLERK

AFFIDAVIT OF GAY BARBARIN

(Filed June 16, 1989)

BEFORE ME, the undersigned authority, personally came and appeared, GAY BARBARIN, who after being duly sworn, did depose and say:

She, a black woman, was one of eleven (11) jurors who retired to deliberate this case, at approximately 12:45 p.m. on April 26, 1989;

Throughout the deliberations, juror Everett W. Granderson, Jr. repeatedly made racist and prejudiced remarks involving matters irrelevant to the evidence presented in the case;

Mr. Granderson stated that Jerry Young's case was like the case of the slaves when they were brought to this country from Africa, and that the steel beams were stowed the way the slaves had been stored on ships;

Mr. Granderson said that the blacks and women on the jury should have been especially sympathetic to Jerry Young's plight because he is a black man;

Mr. Granderson also repeatedly referred to the fact that this case involved a single man against big rich companies, that in order for the companies to fee something, the award had to be more than a slap on the hand, and that the sum of $2,500,000.00 would make the companies feel something;

Mr. Granderson also said that if Jerry Young didn't get anything from these two companies, then Jerry Young wouldn't get anything at all, because, according to Mr. Granderson, Jerry Young had an incompetent lawyer, G.M.B.; G.M.B.

Mr. Granderson repeatedly referred to us other jurors as stupid and as children;

Mr. Granderson threatened to hold up deliberations indefinitely unless Jerry Young received the sum Granderson believed he should receive, and Mr. Granderson indicated that he could not be persuaded to change his mind; although he later changed his mind; G.M.B.

At the end of the night, we jurors reluctantly agreed to a compromise between what Mr. Granderson wanted to award Jerry Young ($2.5 million) and what we wanted to award him; G.M.B.

During the entire course of our deliberations, Mr. Granderson never once referred to any of the evidence which the parties had presented, but, to the contrary, he said that it was their jury's duty to compensate Jerry Young for reasons not presented in evidence.

The foregoing is true and correct.

/s/ Gay Monica Barbarin
GAY BARBARIN

SWORN TO AND SUBSCRIBED
BEFORE ME, THIS 15th
DAY OF JUNE, 1989.

/s/ Paul A. Bello
NOTARY PUBLIC

EXHIBIT 4

CONFIDENTIAL

CIVIL DISTRICT COURT OR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 84-17780 DIVISION "I" DOCKET NO. 4

JERRY YOUNG

VERSUS

ARMADORES de CABOTAJE, S.A. and
K&B EQUIPMENT COMPANY

FILED:_____ _____
DEPUTY CLERK

AFFIDAVIT OF CYNTHIA S. GLEASON

(Filed Aug. 11, 1989)

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned Notary, personally came and appeared

CYNTHIA S. GLEASON

who, upon being first duly sworn did depose and say that:

She was one of the jurors who served in this case and participated in the deliberations over an approximate 10-hour period on April 26, 1989;

Throughout the deliberations, statements were repeatedly made by one of the male jurors which demonstrated a severe racist attitude towards whites as well as

prejudice against corporations, foreign nationalities and women;

This juror was extremely aggressive and belligerent and verbally attacked all of the other jurors, and repeatedly raised his voice to the point that he was screaming;

Rather than discuss the evidence, he said that the case should be used as a means of promoting social change and that the defendants, who were foreign corporations, had many millions of dollars and that to punish them beyond a slap on the hand, the jurors should give a multi-million dollar award to the plaintiff, who was a black man;

She felt very badly about the remarks which this racist juror repeatedly made and grew increasingly uncomfortable, almost to the point that she wanted nothing more to do with the deliberations and the trial;

She grew very weary of the deliberations over the course of many hours and became hungry, tired, and concerned about getting back to her family and work;

The juror's verbal attacks continued and were based purely on bias, sympathy, passion, prejudice and racism;

As it grew late in the night on April 26, 1989, she and other jurors simply wanted to end the ordeal and she thus consented to a verdict in the amount which was much greater than she otherwise believed was proper;

But for the combination of the verbal attacks of this other juror and the length of the deliberations, she would not have consented to the verdict of the majority in the amount of damages rendered;

She believed that Cooper Stevedoring Company was in some degree at fault for Mr. Young's accident and thought that the jury interrogatories should have provided for a finding of fault against Cooper Stevedoring Company;

Her affidavit is true and correct and is made on the basis of her personal information, knowledge and belief.

/s/ Cynthia S. Gleason
CYNTHIA S. GLEASON

SWORN TO AND SUBSCRIBED BEFORE
me this 9th day of August, 1989.

/s/ Bruce D. Burglass, Jr.
NOTARY PUBLIC

My commission is for life.

STATE OF LOUISIANA
COURT OF APPEAL, FOURTH CIRCUIT

NO. 90-CA-1107

JERRY YOUNG

Plaintiff-Appellee

VERSUS

ARMADORES de CABOTAJE, S.A., et al.

APPEAL FROM CIVIL DISTRICT COURT
PARISH OF ORLEANS
NO. 84-17780
HONORABLE BERNETTE JOHNSON

ORIGINAL BRIEF OF APPELLANT,
EMPRESA NACIONAL SIDERURGICA, S.A.
(Filed Oct. 10, 1990)

MILES P. CLEMENTS, T.A.
ANDREW S. DE KLERK

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APPEAL COUNSEL FOR
EMPRESA NACIONAL
SIDERURGICA, S.A.
DEFENDANT, APPELLANT

CIVIL CASE

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* * *

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* * *

11. The Trial Judge Abused her Discretion in Failing to Grant a New Trial Due to Jury Misconduct. 66

* * *

11.

The Trial Judge Abused Her Discretion in Failing to Grant a New Trial Due to Jury Misconduct

How did a jury assess liability for a stow which the offloading longshoreman's foreman described as perfect, and then award damages exceeding even plaintiff's proof? The combination of jury misconduct and a claustrophobic marathon deliberation imposed by the trial Court provides the answer.

Upon completion of closing argument at 11:30 a.m. on Wednesday, April 26, the eleven jurors advised the Court that they were ready to decide the case and did not need to take a lunch hour. Instead, they took a fifteen-minute coffee break, returned to the courtroom and received their instructions. At approximately 12:45 p.m. they retired to the empty courtroom at the other end of the third floor of Civil District Court to deliberate. Mr. Everett W. Granderson, Jr. was initially elected to act as

foreman and the deliberations immediately began in a confrontational manner as Mr. Granderson launched an emotional, verbal attack on the other jurors. He began literally screaming and throughout the afternoon and night, anyone located *anywhere* on the third floor of the Courthouse could hear the screaming. The other jurors were initially so upset by the aggressiveness of Mr. Granderson, that approximately one hour into the deliberations, Mr. Robert N. Jessup, Jr. was elected as foreman to replace Mr. Granderson. However, this reportedly only fueled the flames of Mr. Granderson's ire and he continued to make statements reflecting prejudice, bias, sympathy and passion. (See juror affidavits attached hereto as Appendix 10).

Specifically, Mr. Granderson viciously attacked other jurors on the basis of race and sex. He made statements designed to inflame the jury against corporations, particularly foreign corporations, insisting that plaintiff be awarded more than two million dollars as a punitive measure since anything else would mean nothing to a corporate defendant. He implored the jurors to render their verdict solely as a means of accomplishing some sort of racial justice.

The Court did not permit a dinner break but made the jurors continue deliberations until 8:30 p.m. At that time the Court recalled the jury to the courtroom and delivered a "dynamite charge". (VII, 48, 50) Included in the Court's instructions was the admonition that the jurors should not be affected by prejudice, sympathy, or passion. Nevertheless, immediately upon returning to deliberate, Mr. Granderson continued to harass the other jurors with his vicious style of racism. At that point,

having had nothing to eat all day, most of the jurors became exhausted, By 10:00 p.m., many of the jurors stated that they were not only hungry and exhausted, but that they were concerned about their families and their jobs. In the last fifteen minutes of deliberations, most of the jurors gave in to Mr. Granderson's demands simply as a means of ending the ordeal and going home. Consequently, in those last few minutes, the jurors acquiesced to the racist attack and the injustice was complete. Exhausted, the jury returned to the courtroom at 10:30 p.m. and gave its verdict awarding plaintiff one million, seven hundred thousand dollars, plus pre-judgment interest accruing since 1982. The Foreman Jessup and one other juror did not join in the verdict. (See Appendix 11)

In view of these deliberations, it is clear that the jury should have been allowed to remain hung. During the evening, defense counsel asked the trial Judge to permit the jury to go home and return to deliberate the following day. The Court refused. Instead, by holding the jurors until they rendered a verdict of some kind, a result was obtained which was the product of bias, prejudice, sympathy and passion.

As part of its post-trial motions, ENSIDESA submitted the three juror affidavits, including that of Ms. Cynthia Gleason, a member of the majority. (Appendix 10). All three affidavits show that because of the circumstances of the deliberations, the jurors' resistance was worn down and the verdict was not the result of the impartial administration of justice. ENSIDESA deserved a new trial on that basis alone and the trial Court abused its discretion in refusing to so order.

In the post-trial motions, plaintiff mischaracterized the jury's behavior as merely irregular. ENSIDESA's complaints are far more serious and vital to the administration of impartial justice than the problems discussed in the cases cited by the plaintiff. For example, the issue in *Blandino v. Brown Erection Company, Inc.*, 341 So.2d 577, 579 (La.App. 2d Cir. 1977), was whether improper behavior could arise from the presence on the jury of a highly opinionated person. In *Gormley v. Grand Lodge of State of Louisiana*, 503 So.2d 181 (La.App. 4th Cir. 1987), the issue was whether a lawclerk's conduct in entering the jury room to determine and communicate to the Judge the jury's difficulties with interrogatories, sufficiently affected the neutrality of the Court such that a new trial was necessary. The Court held that the lawclerk merely acted as a messenger and that a new trial was unnecessary.

Pursuant to Louisiana Code of Evidence, Article 606(B), juror affidavits are generally not considered by the Courts. However, exceptions are recognized when jurors have not been truthful during *voir dire*. See: *Rains v. Diamond M. Company*, 396 So.2d 306 (La.App. 3rd Cir. 1981), *writ denied*, 399 So.2d 623 (La. 1981), *Bennett v. Sedco Maritime*, 520 So.2d 894 (La.App. 3rd Cir. 1987) and *Valerie Wright v. Bernard Hirsch, M.D., New Orleans General Hospital and Insurance Corporation of America*, No. 89-CA-0788, Court of Appeal, 4th Cir., State of Louisiana, (See Appendix 21).

The Federal Rule, from which Article 606(B) materially derives, allows an exception for statements which tend to show deceit during *voir dire*. See, *e.g., Hard v. Burlington Northern R.R.*, 812 F.2d 482, 484-85 (9th Cir.

1987), *Maldonado v. Missouri Pacific Ry. Co.*, 798 F.2d 764, 770 (5th Cir. 1986). The affidavits which ENSIDESA offers fall precisely within this exception. These affidavits show that juror Granderson grossly violated his oath of impartiality and disregarded the Court's instructions with regard to the law's equal treatment of persons of any race and corporations of any size or nationality. In light of the grave due process questions arising from this jury's impartiality and misconduct, ENSIDESA urges this Court to consider the matter fully and, if nothing else, to grant them a new trial on the grounds set forth in the Louisiana Code of Civil Procedure, Article 1972 and 1973, which provide as follows:

> **Art. 1972. Peremptory Grounds.**
>
> A new trial shall be granted, upon contradictory motion of any party, in the following cases:
>
> * * *
>
> (3) When the jury was bribed or has misbehaved improperly so that impartial justice has not been done.
>
> **Art. 1973. Discretionary Grounds.**
>
> A new trial may be granted in any case if there is good ground therefor, except as otherwise provided by law.

It is a fundamental matter of procedural due process that a litigant be afforded a fair and meaningful opportunity to be heard. *See, e.g., Century Bank in New Orleans v. Doley*, 527 So.2d 437, 438 (La. App. 4th Cir. 1988); *Hicks v. Schouest*, 381 So.2d 977, 978 (La. App. 4th Cir. 1980). A

necessary ingredient of the fair hearing aspect of due process is that jurors will respect above all their oath of impartiality and decide cases solely on the evidence presented. *See, State v. Mejia,* 197 So.2d 73, 76 (La. 1967) ("a fair trial in a fair tribunal is a basic requirement of constitutional due process.") (citing *Irvin v. Dodd,* 366 U.S. 717, 81 S.Ct. 1639 (1961)).

The attached affidavits of Robert N. Jessup, Jr., Gay Barbarin and Cynthia S. Gleason are replete with proof that Mr. Granderson violated his oath of impartiality. The consequence of Granderson's misconduct is that ENSIDESA was denied a fair hearing and deprived of procedural due process of law.

Inasmuch as the jury's deliberations in this instance may well be classified as "ill practices", ENSIDESA also relies on the provisions of Art. 2004 of the Louisiana Code of Civil Procedure pursuant to which a final judgment may be annulled. Article 2004 allows "[a] final judgment obtained by fraud or ill practices" to be annulled. If the circumstances show (1) the deprivation of legal rights of the litigant who seeks relief, and (2) the enforcement of the judgment would be unconscionable and inequitable, the Court may annul the judgment. *See, Century Bank in New Orleans v. Doley,* 527 So.2d 437, 439 (La. App. 4th Cir. 1988) (citing *Kem Search, Inc. v. Sheffield,* 434 So.2d 1067, (La. 1983)). Thus, even if Granderson's misconduct falls short of denying ENSIDESA due process, it was abusive and prejudicial enough to ensure an unconscionable and inequitable result. That is enough for this Court to declare the judgment a nullity.

* * *

STATE OF LOUISIANA

COURT OF APPEAL, FOURTH CIRCUIT

NO. 90-CA-1107

JERRY YOUNG

VERSUS

ARMADORES de CABOTAJE, S.A., et al

APPEAL FROM CIVIL DISTRICT COURT
PARISH OF ORLEANS
NO. 84-17780
HONORABLE BERNETTE JOHNSON

REPLY BRIEF OF APPELLANT, EMPRESA NACIONAL SIDERURGICA, S.A.

(Filed Jan. 11, 1991)

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DEFENDANT, APPELLANT

CIVIL CASE

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* * *

6. **The jury misconduct issue.**

Plaintiff's treatment of this issue is very misleading. Firstly, plaintiff maintains that the issue of truthfulness during *voir dire* was not raised in the motion for a new trial. That statement is simply flat wrong. ENSIDESA specifically raised the issue, and argued it, at p.8 of its Reply Memorandum to Plaintiff's Opposition to Motions for JNOV and New Trial and to ARCASA's submissions on the cross-claims. The question was therefore very definitely before the trial court during the consideration of the new trial.

Then, having steadfastly refused to concede that any exception to the general rule of inadmissibility of juror affidavits even existed, finally, in the face of the clear precedent contained in ENSIDESA's brief, this concession is now reluctantly made, but with a plea of avoidance. The actual *voir dire* examination by the court and counsel is not transcribed, thus it is a cheap argument to say that a particular question was not answered truthfully. It also misses the point again. The affidavits clearly show that the juror concerned violated the oath of impartiality administered during the *voir dire* process and openly showed an inability to be fair towards corporations in general, and foreign corporations in particular (something which counsel recalls as being specifically raised on *voir dire* questioning). Thus, under the applicable jurisprudence, the affidavits are clearly admissible under these circumstances.

Plaintiff also ignores the holding of this court in the case of *Valerie Wright v. Bernard Hirsch, M.D., et al.*, No. 89-CA-0788, Court of Appeal, 4th Cir., State of Louisiana. In that case this court ruled that a new trial is mandated where the jury misconduct is of such a grievous nature as to preclude the impartial administration of justice. That is clearly the case here. Plaintiff's arguments miss the beat completely. Not only is the law to the effect that the affidavits are admissible under these circumstances, but a new trial is mandated if the juror was dishonest during the *voir dire* process *and* if the misconduct precluded the impartial administration of justice.

Under the extremely egregious circumstances in this case even the most insensitive observer must admit that ENSIDESA was denied due process and a fair trial.

* * *

STATE OF LOUISIANA

SUPREME COURT

NO. 93-C-1592 93 C 1607

JERRY YOUNG

PLAINTIFF

VERSUS

ARMADORES DE CABOTAJE, S.A., ET AL

CIVIL DISTRICT COURT
PARISH OF ORLEANS, NO. 84-17780
HONORABLE BERNETTE JOHNSON, JUDGE

LOUISIANA COURT OF APPEAL
FOURTH CIRCUIT
NO. 90-CA-1107

APPLICATION FOR WRIT OF CERTIORARI
OR REVIEW ON BEHALF OF
EMPRESA NACIONAL SIDERURGICA, S.A.

DEFENDANT/APPLICANT

(Filed June 11, 1993)

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* * *

ASSIGNMENT OF ERRORS

1. Despite LA-C.E. Art. 606's General prohibition of juror affidavits to impeach a verdict, the Court of Appeal erred by failing to consider affidavits regarding gross jury misconduct, and in sanctioning the trial court's denial of ENSIDESA's motion for new trial and its failure to hold a hearing to address the issues of misconduct, all in violation of ENSIDESA's constitutional right to due process.

* * *

SUMMARY OF ARGUMENT

The trial court and the Court of Appeal have sanctioned the violation of ENSIDESA's constitutional right to due process by failing to consider affidavits by three jurors which clearly demonstrate that the jury deliberations were infected with the racism, sexism, xenophobia, bias and hatred of one aggressive juror. Despite **LA-C.E. art. 606b's** general prohibition of impeaching verdicts through juror affidavits regarding intra-jury misconduct, the jurisprudence does recognize an exception where a constitutional violation has been well-pleaded, with the reasonable possibility that prejudice occurred. ENSIDESA submits that the affidavits clearly demonstrate misconduct of a magnitude rising to the level of a violation of due process. As such, ENSIDESA submits that a new trial is warranted.

* * *

ASSIGNMENT OF ERROR NO. 1

The jury in this case was infected with the racism, sexism, xenophobia, bias and hatred of one juror, Mr. Everett W. Granderson, Jr., and the trial court's failure to even consider the overwhelming, uncontradicted evidence of misconduct, as well as the appellate court's sanction thereof, amounts to a violation of ENSIDESA's constitutional right to due process and does not comport with the jurisprudence which holds that despite **LA-C.E. art 606's** prohibition of juror testimony and/or affidavits regarding intra-jury misconduct, upon a showing that a constitutional violation occurred, with the reasonable possibility that prejudice existed, the trial court must hold an evidentiary hearing to consider the misconduct. The trial court's failure to hold a hearing, coupled with its complete lack of recognition of the issue in its blanket denial of ENSIDESA's post-trial motions, have unduly and irreparably prejudiced ENSIDESA, and such prejudice amounts to a violation of ENSIDESA's right to due process under Article 1 § 2 of the Louisiana Constitution and the Fourteenth Amendment to the United States Constitution. Moreover, in failing to offer any relief from the trial court's abuses, the Fourth Circuit has condoned this grave error and has now left ENSIDESA with no other forum but the instant in which to address the misconduct. The trial court's disregard for this misconduct and refusal to even hold a hearing to address the issue are irreconcilable with the most basic principles of due process. Indeed, it is ***unconscionable*** to think that a court would refuse to exercise its discretion in granting a new trial had such racism and hatred been directed at the plaintiff.

To appreciate the magnitude of the denial of ENSIDESA's rights, a review of the facts surrounding the completion of the trial is necessary. Subsequent to closing argument at 11:30 a.m. on Wednesday, April 26, the eleven jurors advised the court that they were ready to decide the case and did not need to take a lunch hour. Instead, they took a fifteen-minute coffee break, returned to the courtroom and received their instructions. At approximately 12:45 p.m. they retired to the empty courtroom at the other end of the third floor of Civil District Court to deliberate. Juror Granderson initially was elected to act as foreman and the deliberations immediately began in a confrontational manner as Granderson launched an emotional, verbal attack on the other jurors. He literally began screaming, and throughout the afternoon and night, anyone located *anywhere* on the third floor of the Courthouse could hear the screaming. The other jurors were initially so upset by the aggressiveness of Granderson that approximately one hour into the deliberations Mr. Robert N. Jessup, Jr. was elected as foreman to replace Granderson. This only fueled the flames of Granderson's ire, however, and he continued to make statements reflecting prejudice, bias, sympathy and passion. (*See* Juror Affidavits, Appendix 5).

Specifically, and most offensive, Granderson confronted jurors with accusations that they had no comprehension of what black men (Messrs. Young and Granderson are both black) have had to go through, that they were unsympathetic to the black man's cause and that blacks have had to pay a price for coming over on ships from Africa. His racism then lead to imploring the

jury to render their verdict solely as a means of accomplishing racial justice. Further, Granderson viciously attacked female jurors on the basis of their sex, stating that they were inferior to men and were "wishy-washy" in making up their minds. He made statements designed to inflame the jury against corporations, particularly foreign corporations, portraying them as extremely powerful and united together to run everything. Granderson insisted that plaintiff be awarded more than two million dollars as a punitive measure since anything else would mean nothing to a corporate defendant (*See* Affidavits, Appendix 5).

The Court did not permit a dinner break, but made the jurors continue deliberations until 8:30 p.m. At that time the Court recalled the jury to the courtroom and delivered a "dynamite charge". Immediately upon returning to deliberate, Granderson continued to harass the other jurors with his vicious style of racism. At that point, having had nothing to eat all day, most of the jurors became exhausted. By 10:00 p.m., many of the jurors stated that they were not only hungry and exhausted, but that they were concerned about their families and their jobs. In the last fifteen minutes of deliberations, most of the jurors gave in to Granderson's demands simply as a means of ending the ordeal and going home. Consequently, in those last few minutes, the jurors acquiesced to the racist attack and the injustice was complete (*See* Affidavits, Appendix 5). The jury returned to the courtroom at 10:30 p.m. and delivered its verdict awarding plaintiff one million, seven hundred thousand dollars, plus pre-judgment interest accruing since 1982. As the appellate court noted, the verdict far exceeded even the

plaintiff's own evidence (Appendix 2, p. 41-42). The Foreman Jessup and one other juror did not join the verdict (*See* Appendix 6).

As part of its post-trial motions, ENSIDESA submitted the three separate juror affidavits, from jurors of both black and white races, including that of Ms. Cynthia Gleason, a member of the majority. (*See* Appendix 5, 7).[1] All three affidavits show that because of the circumstances of the deliberations and the grave misconduct of Granderson, the verdict was not the result of the impartial administration of justice. ENSIDESA deserved a new trial on that basis alone and the trial Court abused its discretion in granting this (or any) relief.

LSA-C.E. art. 606 provides in part:

> Upon an inquiry of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether any outside influence was brought to bear upon any juror. . . . Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

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[1] One affidavit was an exhibit to ENSIDESA's Supplemental Memorandum in Support of Motion for New Trial. The other two were filed as supplemental exhibits thereto.

LSA-C.E. art. 606B. The Fourth Circuit refused to consider the affidavits based on Rule 606. This refusal, however, does not comport with the jurisprudence which *does allow* juror testimony upon the pleading of a constitutional violation, with the reasonable possibility that prejudice resulted.

It is a fundamental matter of due process that a litigant be afforded a fair and meaningful opportunity to be heard at trial, *see Century Bank in New Orleans v. Doley*, 527 So.2d 437, 438 (La.App. 4th Cir. 1988); *Hicks v. Schouest*, 381 So.2d 977,978 (La.App. 4th Cir. 1980), and a necessary ingredient of that due process is that jurors respect above all their oath of impartiality and decide cases solely on the evidence presented, without bias, prejudice, sympathy or passion. *See State v. Mejia*, 197 So.2d 73, 76 (La. 1967) ("a fair trial in a fair tribunal is a basic requirement of constitutional due process") (*citing Irwin v. Dodd*, 366 U.S. 717, 81 S.Ct. 1639 (1961)). The misconduct of Granderson infected the jury in this case and clearly led to a verdict that was wrong and contrary to the evidence.[2] Such gross violations of the jury's duty of impartiality and of ENSIDESA's fundamental right to due process warrants a new trial, and at the very least, warranted a hearing in which to address the specific instances of partiality.

In *State v. Graham*, 422 So.2d 123 (La. 1982), *appeal dismissed*, 461 U.S. 950, 103 S.Ct. 2419, 77 L.Ed.2d 1309

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[2] Evidence of this can be seen in the amount of damages awarded to the plaintiff beyond that which was proven. The award was reduced by the Fourth Circuit because it was "excessive and contrary to the law and evidence." (Appendix 2, p. 4).

(1983), this Court specifically held that "the absolute language of the statute [prohibiting a juror's testimony or affidavit to impeach a verdict] cannot be applied to deprive a criminal defendant of his constitutional rights." *Id.* at 138. The statute to which the Court referred was **La.R.S. 15:470,** which has since been repealed and replaced by **LSA-C.E. art. 606B.**[3] The Court held further that its "application of the jury privilege statute in this manner aligns with the [United States Court of Appeals for the] fifth Circuit's construction of the same statute [citing *Durr v. Cook,* 589 F.2d 891, 893-94 (5th Cir. 1978)]. Moreover, this approach of looking behind an evidentiary privilege has been virtually mandated by the United States Supreme Court." *Graham,* 422 So.2d at 138 (*citing Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). Thus, upon well pleaded allegations of a constitutional violation, with the *reasonable possibility* that prejudice existed, the prohibition of Rule 606B *must* give way. *State v. Duncan,* 563 So.2d 1269, 1272 (La.App. 1st Cir. 1990); *State v. Arnold,* 466 So.2d 520, 528 (La.App. 3d Cir.), *writ denied,* 470 So.2d 124 (La. 1985).

ENSIDESA recognizes that the great weight of authority supporting relaxation of the prohibition of Rule 606B has developed within the realm of criminal law, but submits that the Rules of Evidence apply to both criminal

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[3] Rule 606B clarifies La.R.S. 15:470, "but does not change the requirements for overcoming the prohibition against juror testimony. Therefore, the prior jurisprudence remains applicable." *State v. Harris,* 597 So.2d 163, 165 (La.App. 2d Cir. 1992) (*citing State v. Duncan,* 563 So.2d 1269 (La.App. 1st Cir. 1990), *appeal after remand,* 593 So.2d 693 (La.App. 1st Cir. 1991), *writ denied,* 594 So.2d 876 (La. 1992)).

and civil proceedings, and therefore, the interpretation of the Rules by the judiciary in a criminal case is of equal force in civil litigation. Likewise, constitutional rights are of no lesser validity and force for the law abiding individual or entity than to the criminal, and thus, ENSIDESA submits that relaxation of Rule 606B's prohibition in the face of alleged constitutional violations of the rights of a criminal should likewise occur in the face of such violations of the rights of a civil litigant.

In *Wright v. Hirsch,* 560 So.2d 835 (La. 1990), this Court was presented the issue of juror misconduct in a civil case. In *Wright,* a juror was alleged to have behaved improperly by conducting independent research into the subject matter of the case and communicating the results thereof to the other jurors. Based on a single affidavit regarding the misconduct, coupled with the fact that no evidence was adduced at the hearing on the motion for a new trial based on the misconduct, this Court was unable to classify the trial court's denial of the motion for a new trial as an abuse of discretion. *Id.* at 836. Regardless of the merit of that claim of misconduct, however, most telling to the instant case is the fact that in *Wright:* (1) and affidavit was considered[4]; and (2) a hearing was held to determine the legitimacy of the claim of misconduct. Here, the trial court did not hold a hearing to inquire as to the serious allegations of racism, sexism, xenophobia, bias and hatred, much less did the court even mention the

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[4] The affidavit there was from plaintiff's counsel's intern who learned of the misconduct from a juror. ENSIDESA submits that there is no other way to relate the grave misconduct except through the three jurors' statements, sworn to, under oath.

issue in its ruling on post-trial motions, but rather issued a blanket denial in its Judgment (Appendix 1).

Federal cases interpreting Federal Rule of Evidence 606(b), after which Louisiana's rule was modeled, are quite instructive. In *Smith v. Brewer,* 444 F.Supp. 482 (S.D. Iowa) *aff'd,* 577 F.2d 466 (8th Cir.), *cert. denied,* 439 U.S. 967, 99 S.Ct. 457, 58 L.Ed.2d 426 (1978), the district court stated that "the rule of juror incompetency embodied in Rule 606(b) should [not] be applied dogmatically in complete disregard of what is alleged to have occurred in the jury room." 444 F.Supp. at 490. The court looked to the civil case of *McDonald v. Pless,* 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed. 1300 (1915), in support of the foregoing recognition of the rule giving way, wherein the United States Supreme Court stated that "there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice.' " 232 U.S. at 268-69, 35 S.Ct. at 785. Particularly, the *Smith* court stated that where "an offer of proof showed that there was a substantial likelihood that a criminal defendant was prejudiced by the ***influence of racial bias in the jury room,*** to ignore the evidence might very well offend fundamental fairness." *Smith,* 444 F.Supp. at 490 (emphasis supplied) (*citing United States v. Booker,* 480 F.2d 1310 (7th Cir. 1973)).

Professors Wright and Gold provide a comprehensive analysis of the policy behind relaxation of Federal Rule 606's prohibition:

> As a consequence of th[e] collision with constitutional principles, blanket rules either

> excluding all juror testimony of bias or admitting all such testimony are inappropriate. A balance must be struck, protecting parties from the most egregious cases of jury bias while leaving the jury free to decide most cases without fear of judicial intrusion. While lines may be difficult to draw in many cases, **it should be clear that among the most serious cases of jury bias are those involving *racial prejudice*.** Eradication of the evil of state supported racial prejudices is at the heart of the Fourteenth Amendment. This suggests that the constitutional interests of the affected party are at their strongest when the jury allegedly employs such bias. The operation of racial prejudice undermines the jury's ability to perform the role of preventing governmental oppression and, in fact, converts the jury itself into an instrument of that oppression. This also suggests that the policy interests behind the enforcement of Rule 606(b) are at their *weakest* in such a case.

Wright and Gold, 27 Federal Practice & Procedure § 6074, p. 438 (1990) (emphasis supplied) (*citing, inter alia, Carson v. Polley,* 689 F.2d 562, 581-82 (5th Cir. 1982) (civil case stating that "[i]n an appropriate case, a letter from a juror to the court may reveal such a magnitude of prejudice as to move the court to grant a new trial rather than suffer an obvious default of justice"); *King-Size Publications Inc. v. American News Company,* 194 F.Supp. 109 (D.N.J. 1961) (civil case holding that juror's deep-seated prejudice expressed in letter to court warranted setting aside jury verdict). Thus, it is clear that Rule 606 is not absolute, and ENSIDESA submits that given the constitutional violation of due process caused by the gross misconduct in this case, as well as the great prejudice

suffered, ENSIDESA is entitled to a new trial in which to fairly and impartially defend its rights. Anything less would undoubtedly be ***"an obvious default of justice"***.

* * *

CONSTITUTIONAL AND CODAL PROVISIONS INVOLVED

DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, U.S. CONST.:

> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * * .

LOUISIANA CODE OF CIVIL PROCEDURE:

Art. 1762. Swearing of juror before examination

Before being examined, every prospective juror shall be sworn or shall affirm to answer truthfully such questions as may be propounded to him.

Art. 1763. Examination of juror

A. The court shall examine prospective jurors as to their qualifications and may conduct such further examination as it deems appropriate.

Art. 1768. Swearing of jurors; selection of foreman

When the jury has been accepted by all parties, the jurors shall be sworn to try the case in a just and impartial manner, to the best of their judgment, and to render a verdict according to the law and the evidence. When the jury has retired, the jurors shall select a foreman to preside over them and sign the verdict which they may render.

LOUISIANA CODE OF EVIDENCE ARTICLE 606(B):

B. Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether any outside influence was improperly brought to bear upon any juror, and, in criminal cases only, whether extraneous prejudicial information was improperly brought to the jury's attention. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.